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ON THE CONCEPT OF WORKABLE COMPETITION AS AN ANTITRUST GUIDE

by

GEORGE W. STOCKING*

Dirlam and Stelzer's article, "The Cellophane Labyrinth," [1] combined a rejection of workable competition standards as measures of antitrust violation with a misstatement of what Mueller and I were doing in our analysis of du Pont's position in the manufacture and sale of cellophane.[2] They stated, "Without enquiring into the consequences of relying on exclusively economic tests in antitrust cases, nor exhibiting awareness of the dangers that had been pointed out of the employment of this particular concept, two economists proceeded to attack the *Cellophane* decision simply on grounds that competition in cellophane was not workable." [3] This is not what we did at all. What we did was to challenge Judge Leahy's conclusion that du Pont had no monopoly in making and selling cellophane.[4] This is an economic problem and we resorted to economic analysis to answer it.

Since, as my published work on the subject shows,[5] I am among those economists who reject workable competition as an antitrust

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1 1 Antitrust Bulletin 633 (1956).

2 Stocking and Mueller, "The Cellophane Case and the New Competition," 45 Am. Econ. Rev. 29 (1955).

3 Dirlam and Stelzer, "The Cellophane Labyrinth," 1 Antitrust Bulletin 633, 641 (1956).

4 In the antitrust case brought by the Department of Justice Judge Leahy of the federal district court for Delaware ruled that du Pont had no monopoly power over cellophane and that if it did it was not unlawful. *United States* v. *E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953). The Supreme Court affirmed, 351 U. S. 377 (1956).

5 Stocking and Watkins, *Monopoly and Free Enterprise* 92-109 (1951); Stocking, "The Rule of Reason, Workable Competition, and the Legality of Trade Association Activities," 21 U. Chi. L. Rev. 527 (1954); "The Rule of Reason, Workable Competition, and Monopoly," 64 Yale L. J. 1107 (1955); "The Attorney General's Committee's Report: The Businessman's Guide Through Antitrust," 44 Georgetown L. J. 1 (1955). I discuss the position I took in these publications later in this article.

guide, my present endeavor is to trace the development of the proposal that the concept be adopted in antitrust proceedings, show my position with respect to it, and attempt to clear up any misunderstanding that my two published discussions of cellophane[6] may have created.

At the outset it may be helpful to restate as succinctly as I can the concept of workable competition. Both pure competition and pure monopoly are neoclassical conceptions. They are both abstractions. Pure competition reflects the absence of all monopoly power; pure monopoly, the absence of all competition except competition for the consumer's dollar. Pure competition contemplates a market in which sellers and buyers are so numerous and so small—and products are so standardized—that none can exert any influence over the market by the decisions he makes. Price is a datum. It influences the decisions of every entrepreneur as to how much he produces, but the decision of each has no effect on it. Under pure monopoly a single seller's product has an isolated market. It has no rival products. The contemporary business world obviously cannot conform to the economists' models of either pure competition or pure monopoly. In many industrial sectors the number of producers is necessarily small, and many businessmen have through advertising and innovation so differentiated their product that they can set its price. In few if any markets does a "monopolized" product fail to meet the competition of distant substitutes. Some degree or characteristic of monopoly pervades nearly all sectors of business. Since neither pure competition nor pure monopoly is desirable or attainable, a private enterprise economy must get along with an acceptable compromise. Workable competition is a term economists give to that rather ill-defined market situation that is socially acceptable. It is the best available and it is good enough. Personal judgments obviously enter into the evaluation of any competitive arrangement when judged by the standard of workable competition. But economists have indicated what to look for in making judgments. They regard industrial structure, business conduct, and business performance as relevant. Industrial structure is significant in judging the degree of

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[6] Stocking and Mueller, "The Cellophane Case and the New Competition," 45 Am. Econ. Rev. 29 (1955); Stocking, "The Rule of Reason, Workable Competition, and Monopoly," 64 Yale L. J. 1107, 1136-47 (1955).

monopoly power. Business conduct indicates whether businessmen are engaging in practices detrimental to competition. Industrial performance is ill-defined, but some economists believe it is useful in determining the social acceptability of market arrangements. Economists differ in the emphasis they would give to these three criteria, but most would acknowledge the relevance of each.

Origins of the Proposal to Use Workable Competition in Antitrust

Efforts to revise the antitrust laws to insure their administration in accordance with economic principles rather than legalistic standards, although greatly intensified in recent years, originated some two decades ago. Mason in a 1937 article on "Monopoly in Law and Economics" [7] lamented the differentiation between legal and economic concepts of monopoly. Mason found that the term monopoly was being used in the law as a standard of evaluation, and that the courts determined its status by examining business practices. Contracts that restricted competition unreasonably were unlawful, and the use of predatory business practices was evidence of the intent to monopolize. Economists, on the other hand, regarded monopoly as a tool of economic analysis and looked on market control as evidence of monopoly. Thus Mason apparently recognized the significance of structure to competition. "The antithesis of the legal conception of monopoly," he said, "is *free* competition. . . . [T]he antithesis of the economic conception of monopoly is not *free* but *pure* competition. . . ." [8]

Mason recognized that in using the monopoly concept as a tool of analysis economists will find no clear-cut dichotomy of monopoly and competition. He pointed out that nearly all market situations contain elements of both competition and monopoly; nevertheless, they should not be condemned wholesale. While Mason apparently recognized the significance of structure to competition, he also regarded performance as an important test of the social acceptability of market arrangements.

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7 47 Yale L. J. 34.

8 *Id.* at 36. (Emphasis in the original.)

> It is not enough to find evidence of the existence of market controls, nor is it sufficient to conduct purely analytical and descriptive studies of various types of control situations. While this is important, the formulation of public policy requires a distinction between situations and practices which are in the public interest and those that are not.[9]

For the courts to inquire into the actual or probable results of restrictive agreements "would be to give up the traditional tests of monopolizing and to grapple with the problem of what is an unreasonable control of the market." [10]

Mason did not regard the courts as alone responsible for the inadequacy of antimonopoly law. The blame also rests with Congress. The shortcomings of public policy "can only be corrected by legislation which will re-define the monopoly and trade practice problem and provide tests by means of which market situations and business practices considered to be favorable to the public interest can be separated from those that are not." [11] Price leadership, price rigidity, advertising expenditures and the like may be sufficient evidence of monopoly, but they are not "sufficient evidence of . . . market controls adverse to the public interest." [12]

This is surely the forerunner of the demand that antitrust laws be formulated and administered in accordance with the concept of workable competition under a rule of reason.

Three years later, Clark gave a name and a more specific content to the concept of workable competition.[13] Recognizing that pure competition is unattainable, Clark argued that the public interest may best be promoted by accepting some departures from

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[9] *Id.* at 49. Dirlam and Kahn have incorrectly interpreted Mason as concerned solely with market structure, and not market performance as well, as evidence of monopoly. *Fair Competition: The Law and Economics of Antitrust Policy* 29 (1954).

[10] 47 Yale L. J. 34, 48.

[11] *Id.* at 46.

[12] *Id.* at 49.

[13] Clark, "Toward a Concept of Workable Competition," 30 Am. Econ. Rev. 241 (1940).

it that might be corrected by regulation, because some other departures are ineradicable and to achieve some of the characteristics of pure competition without achieving all may do more harm than good. Workable competition is the best of market arrangements practically achievable under a private enterprise system, and it is good enough. Although he never clearly differentiated between the two, Clark like Mason would apparently use both structure and performance as tests of workable competition. His workable competition called for a sufficient number of sellers (structure) selling substantially the same product to serve as a check on monopolistic exploitation (performance).[14] Clark argued that in the short run oligopolistic controls may perform a positive public service; in the long run potential competition and the competition of substitutes are likely to insure cost-price relationships and an allocation of resources consistent with pure competition. Moreover, Clark argued, technical progress may be expected to curb monopolistic power by bringing about "still closer and more general substitution." [15] This, together with the increased use of specifications in buying and more knowledge about them, will "increase the number of industries which, despite large-scale production, have the characteristics of fairly healthy and workable imperfect competition, rather than those of slightly-qualified monopoly." [16] As to the policy implications of his analysis, Clark expressed the hope "that government need not assume the burden of doing something about every departure from the model of perfect competition." [17]

In his several articles on basing point pricing,[18] Clark denied the conspiratorial character of this practice, arguing that in oligop-

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[14] *Id.* at 243. See also the quotation in the text at note 21, *infra*, for evidence of Clark's recognition of the performance test.

[15] *Id.* at 256.

[16] *Ibid.*

[17] *Ibid.*

[18] Clark, "Basing-Point Methods of Price Quoting," 4 Can. J. Econ. Pol. Sci. 477 (1938); "Imperfect Competition Theory and Basing-Point Problems," 33 Am. Econ. Rev. 283 (1943); Rejoinder to Professor Mund, 33 Am. Econ. Rev. 616 (1943); "The Law and Economics of Basing Points: Appraisal and Proposals," 39 Am. Econ. Rev. 430 (1949); "Machlup on the Basing-Point System," 63 Quart. J. Econ. 315 (1949).

olistic industries with certain specific characteristics it was of spontaneous origin,[19] and he regarded it as not inconsistent with workable competition. Writing in 1950 after the Supreme Court had upheld the Federal Trade Commission in its condemnation of systematic basing point pricing,[20] Clark argued that

> where impairment of competition is an issue, there should be a showing of how competition is impaired, by comparison with an identifiable concept of what would constitute unimpaired competition in an industry having the unavoidable physical and economic characteristics of the one whose practices are being adjudicated. Accepting the necessity of flexibility and Commission discretion and some resulting uncertainty, it seems that the evils of this situation are aggravated by present procedure, and could be mitigated by introducing, as an integral and arguable part of the case, a comparison of the economic results of existing practice and those which competition could be expected to produce in the industry in question—also, if at all possible, the probable results of the order the Commission proposes to issue. Such a comparative study is the heart of the economics of the case, and should logically be the heart of the law.[21]

On the proper relation between law and economics, Clark further stated his position as follows: "In general, the writer accepts the idea that legality should depend on the economic effects of practices, and that this should be judged by a specialized commission." [22]

While Clark was apparently growing friendlier to a specific modification of the statutes to bring them into conformity with the concept of workable competition, Mason was becoming less certain of the validity of the distinction he had earlier drawn between monop-

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19 Clark, "Imperfect Competition Theory and Basing-Point Problems," 33 Am. Econ. Rev. 283, 288ff. (1943). See Stocking, "The Economics of Basing Point Pricing," 15 Law and Contemp. Prob. 159, 163 (1950).

20 *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683 (1948).

21 Clark, "The Orientation of Antitrust Policy," 40 Am. Econ. Rev. (Proceedings of the American Economic Association) 93, 98 (1950).

22 *Id.* at 99.

oly in an economic sense and illegality,[23] and he recognized that the problem of determining the workability of any concrete industrial situation was not simple. Writing in 1949, he weighed the usefulness of an industry's structural characteristics against its performance in determining its competitive workability and concluded that the one test should supplement the other. But he recognized the limitations of both. About them he said,

> The relative importance to be assigned to the objective of establishing appropriate market limitations on the scope of action of firms as against the objective of encouraging efficient performance in the use of economic resources no doubt presents serious difficulties. It seems probable that individual judgments will always be influenced to some extent by ideological considerations.[24]

Despite the problems it presented, Mason was unwilling to abandon the concept of workable competition as a criterion for administering antitrust, although he thought it more appropriate at some levels of public action than at others: "[T]he most important level within the framework of traditional antitrust policy, at which the question of appropriate standards and objectives can be discussed, is at the level of the enforcement agencies." [25] In selecting cases the enforcement agencies should not ask whether they can win the case but what difference it will make. This "clearly involves a consideration of whether a different structure of the market and set of business practices . . . will be better . . . than the existing structure and practices." [26] This is the essence of the economists' concept of workability.

Markham developed this idea further in his 1950 article, "An Alternative Approach to the Concept of Workable Competition," where he concluded: "An industry may be judged to be workably competitive when, after the structural characteristics of its market and the dynamic forces that shaped them have been thoroughly

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[23] Mason, "The Current Status of the Monopoly Problem in the United States," 62 Harv. L. Rev. 1265 (1949). See esp. p. 1272.

[24] *Id.* at 1283.

[25] *Id.* at 1284.

[26] *Id.* at 1284-85.

examined, there is no clearly indicated change that can be effected through public policy measures that would result in greater social gains than social losses." [27] While apparently accepting the principle of workable competition as a policy guide,[28] Markham recognized its limitations. "It seems hardly necessary to point out, however," he said, "that definitions of workable competition which follow the above suggested pattern, like all others, will not be divorced from value judgments." [29] A few years later Markham's skepticism was even sharper. In 1954 he stated,

> Both its advocates and critics would agree that the concept of workable competition, or its necessary equivalent, has not yet been formally developed to the point where it can usefully be incorporated into the law itself. That is to say, *indicia* of monopoly that can be unswervingly and uniformly applied to all industries, irrespective of their market environment and stage of development, have not yet been clearly identified.[30]

Griffin perhaps more than any other economist has emphasized performance as a test of workable competition. Specifically, he recognized five criteria for judging performance:

> (1) Is the industry (or company) efficient? (2) Is it progressive? (3) Does it show a reasonable and socially useful profit pattern? (4) Does it have as high a degree of freedom of entry as the nature of the industry permits? (5) Is it well suited to serve national defense needs?[31]

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27 40 Am. Econ. Rev. 349, 361 (1950).

28 Markham did not specifically advocate a change in the antitrust laws to make them conform to the principles he enunciated, but he clearly contemplated that the principles would be of use in shaping public policy. In defending his concept of workable competition he said, "[I]t would ascribe paramount importance to that which should be uppermost in the minds of those who formulate public policy—the possibility of prescribing appropriate remedial action. For, unless the concept of workable competition is to be an instrument of public policy, there is little reason for differentiating between workable and pure competition." *Ibid.*

29 *Ibid.*

30 Markham, "The Per Se Doctrine and the New Rule of Reason," paper delivered before Southern Economic Association, 24th annual conference, Biloxi, Miss., Nov. 20, 1954, 22 Southern Econ. J. 22, 29 (1955).

31 Griffin, *An Economic Approach to Antitrust Problems,* American Enterprise Association, xiii (1951).

Although Griffin recognized the vagueness of these tests and the part judgment would play in administering them, he thought they might be useful to enforcement agencies in determining whether to prosecute, to courts and administrative agencies in formulating remedies, to legislatures in amending the statutes or in passing new laws, and in a more limited way to courts in deciding cases.

Other economists, notably Adelman, Bain, Heflebower, Kaplan, and Robertson, have made significant contributions to the concept of workable competition and in doing so have implied, without indicating just how, that it should be of some use in public policy.[32]

Rigorous Antitrust Decisions Alarm Businessmen

While economists were thus viewing with commendable skepticism their own suggestions as to the usefulness of the concept of workable competition as a standard for antitrust policy, court decisions actually bringing the legal concept of monopoly more nearly into conformity with the economic concept were arousing grave concern among businessmen. For example, Judge Learned Hand's application in the *Aluminum* case[33] of the market control concept in defining monopoly; his recognition that power over the market, not its abuse, was the essence of the monopoly problem; his distinction between a firm's achieving monopoly and having monopoly thrust upon it; his denial of the doctrine of specific intent—all made big business uneasy about its legal status. The Supreme Court's decision in the 1946 *Tobacco* case[34] further disturbed business leaders. The Court's acceptance of circumstantial evidence as proof of conspiracy; its

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[32] Adelman, "Effective Competition and the Antitrust Laws," 61 Harv. L. Rev. 1289 (1948); Adelman, "Integration and Antitrust Policy," 63 Harv. L. Rev. 27 (1949); Bain, "Workable Competition in Oligopoly: Theoretical Considerations and Some Empirical Evidence," 40 Am. Econ. Rev. (Proceedings of the American Economic Association) 35 (1950); Heflebower, "Economics of Size," 24 J. of Bus. of U. Chi. 253 (1951); Kaplan, *Big Enterprise in a Competitive System* (1954); Robertson, "On the Changing Apparatus of Competition," 44 Am. Econ. Rev. (Proceedings of the American Economic Association) 51 (1954). Also, Schumpeter, *Capitalism, Socialism, and Democracy* (1942), although not concerned specifically with the concept of workable competition, has influenced considerably those who have been; in particular, his discussion of "the perennial gale of creative destruction" has influenced those who emphasize performance as a test of workability.

[33] *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (2d Cir. 1945).

[34] *American Tobacco Co.* v. *United States,* 328 U. S. 781.

acknowledgement of the relevance to monopoly power of the combined percentage of the cigarette market supplied by the "big three"; its recognition of the significance of advertising expenditures and warehousing costs as obstacles to entry; its refusal to distinguish between actual exclusion and the power to exclude—these looked like threats to big enterprise *per se*. The Court's initial decision in the *Yellow Cab* case,[35] which seemed to bring vertical integration and restrictions on competition affecting merely an "appreciable part" of commerce within the ban of the Sherman Act, contributed to the anxiety of business leaders and their legal advisers.

Academicians' interpretation of the significance of these decisions did not calm the businessmen. Nicholls, in commenting on the *Tobacco* decision before the 1948 meeting of the American Economic Association, characterized it as a milestone in the social control of oligopoly and concluded: "By permitting the inference of illegal conspiracy from detailed similarity of behavior and by shifting attention from the abuse of power to its mere existence . . . the courts have at last brought oligopolistic industries within reach of successful prosecution under the antitrust laws."[36] Rostow saw even greater significance in these decisions. Where a few sellers dominate a market and behave alike with respect to it, proof of conspiracy, he concluded, was unnecessary. About the *Tobacco* decision he said:

> When three companies produce so large a percentage [68 per cent] of market supply, that fact alone is almost sufficient evidence that the statute is violated. Ruthless and predatory behavior need not be shown. The actual elimination of small competitors is unnecessary. . . . Parallel action, price leadership, a reliance on advertising rather than price competition as a means of inducing changes in each seller's share of the market, and, above all, size—the market advantage of a small number of large sellers or buyers—these are now key points to be proved in a case of monopoly, or of combination in restraint of trade. . . . Painstaking search for scraps of evidence with a conspiratorial atmosphere are no longer necessary. . . . [D]ecisive elements

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[35] *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947).

[36] Nicholls, "The Tobacco Case of 1946," 39 Am. Econ. Rev. (Proceedings of the American Economic Association) 284, 296 (1949).

are the power to assert a degree of control over price and output in the market as a whole. . . .[37]

To businessmen the extension of the doctrine of *per se* antitrust violation was equally disturbing. This took place along a number of fronts. In its long struggle to outlaw industry-wide basing point pricing systems, the Federal Trade Commission developed its doctrine of "conscious parallelism of action," and in the *Cement Institute* case[38] it prohibited respondents from following "a planned common course of action" in selling cement on a delivered price basis. In the *Rigid Steel Conduit* case,[39] finding that each respondent had used the basing point system knowing that its rivals did so, thereby preventing competition, the Commission not only banned conspiracy but prohibited respondents individually from selling rigid steel conduit at prices calculated on a basing point system for the purpose or with the effect of systematically matching delivered prices. In the glucose cases[40] the Commission's orders against individual respondents had prohibited price discrimination through either collecting phantom freight or absorbing freight.[41] In each case the Supreme Court sustained the Commission. In its several basing point pricing cases the Commission seemed to be driving towards an outlawing of basing point pricing *per se*. Irving S. Olds, chairman of the board of directors of the United States Steel Corporation, reflected the businessman's response to these several decisions when he concluded that the *Cement*

[37] Rostow, "The New Sherman Act: A Positive Instrument of Progress." 14 U. Chi. L. Rev. 567, 585 (1947).

[38] *Cement Institute,* 37 F. T. C. 87 (1943), *aff'd,* 333 U. S. 683 (1948).

[39] *Rigid Steel Conduit Assn.*, 38 F. T. C. 534 (1944), *aff'd sub nom. Triangle Conduit & Cable Co.* v. *Federal Trade Commission,* 168 F. 2d 175 (7th Cir. 1948), *aff'd by an equally divided court sub nom. Clayton Mark & Co.* v. *Federal Trade Commission,* 336 U. S. 956 (1949).

[40] *Corn Products Refining Co.*, 34 F. T. C. 850 (1942), *aff'd,* 324 U. S. 726 (1945); *A. E. Staley Mfg. Co.,* 34 F. T. C. 1362 (1942), *aff'd,* 324 U. S. 746 (1945).

[41] I base this interpretation of the Commission's orders on their prohibiting the Corn Products Refining Co. from discriminating "in the manner and degree set forth in paragraphs 4 and 5 of the findings as to the facts herein. . . ." 34 F. T. C. 850, 877. Subparagraph (d) of paragraph 4 of the findings recognized freight absorption on sales from the company's Kansas City plant alike with phantom freight as resulting in price discrimination. The *Staley* findings and order were similar. See Stocking, *Basing Point Pricing and Regional Development* 165-67 (1954).

Institute decision promised to disrupt industry and that business should either get the law changed or "educate the Supreme Court." [42] Businessmen professed to believe that to follow customary industrial practices would be dangerous since the Federal Trade Commission might see implied conspiracy in them and hold them illegal *per se*, regardless of the economic conditions that gave rise to them or their effects on the industry in question.

Like the implied conspiracy doctrine, the *Socony-Vacuum* opinion's pronouncement that "[a]ny combination which tampers with price structures is engaged in an unlawful activity" [43] was capable of being used to strike at the exchange of statistical information on costs and prices by a trade association. Although in the *Socony-Vacuum* case the Supreme Court undertook to distinguish the *Appalachian Coals* case[44] by concluding that the coal producers' common selling agency was not designed to fix market price, the similarities between the two cases are more obvious than their differences. The rule of reason had saved the earlier effort to deal with "distress" coal; the *per se* violation doctrine outlawed a similar effort to deal with "distress" gasoline.

In certain Clayton Act cases the Supreme Court, without analyzing the actual or probable effects of a challenged practice on competition in the industry affected, concluded that the effect of proscribed practices might be substantially to lessen competition or tend to create a monopoly. In the *Morton Salt* case it simplified proof in price discrimination cases by holding that a "reasonable *possibility*" [45] of injury to competition was sufficient to convict. In the *Standard Stations* case[46] the Court declared that exclusive dealing contracts become illegal on proof that "competition has been foreclosed in a substantial share of the line of commerce affected." [47] Since competition is fore-

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42 *New York Journal of Commerce*, April 28, 1948, p. 1.

43 *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221 (1940). (Emphasis added.)

44 *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344 (1933).

45 *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 46 (1948). (Emphasis added.) See also *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 742 (1945).

46 *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949).

47 *Id.* at 314.

closed by the existence of a requirements contract, illegality *per se* follows a showing that the requirements contracts affect a substantial share of the commerce involved. In the *Standard Stations* case 6.7 per cent of the petroleum products sold in a seven-state area was "a substantial share."

The Supreme Court's attempts to deal with restrictive arrangements between firms linked by common stock ownership brought forth two decisions that found conspiracy where some students of antitrust saw only a parent-subsidiary relationship.[48]

The Lawyers' Adaptation of Workable Competition

Articulate and influential lawyers, whether they saw in the doctrine of workable competition a crude tool for blunting the impact of the antitrust statutes or a delicate instrument for separating socially desirable from anti-social business practices, and good market structures from bad, clamored for a change in the antitrust statutes. Chief among these were Blackwell Smith, long a skeptic of antitrust policy and exponent of industrial self-government along NRA lines,[49] and S. Chesterfield Oppenheim, distinguished professor of law and expert in the antitrust field. Smith set forth his views at length in an article, "Effective Competition: Hypothesis for Modernizing the Antitrust Laws." [50] Smith, like the economists from whom he borrowed, recognized that pure competition and pure monopoly are abstractions

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48 *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U. S. 211 (1951); *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951).

49 Blackwell Smith was associate counsel for the National Recovery Administration and defended its constitutionality and purposes in a speech delivered to the Federal Bar Association Nov. 15, 1933, "Legal Problems Confronting the National Recovery Administration," 2 Fed. Bar Ass'n J. 3 (1934). In 1938, reviewing Walton Hamilton's *Price and Price Policies*, Smith quoted with approval Hamilton's views on the necessity for collective action in industry: "'The state, with the club of the criminal law, can never beat the behavior that attends the pursuit of gain into accord with rigid norms. The quick staccato of industry cannot be timed to the decorous processes of a legal procedure developed in the days of petty trade. . . . A proper freedom of collective action, within the strict limits of the public interest, must be accorded agencies of business.' Of course, this means authority and control, both public and private." Book Reviews, 48 Yale L. J. 359, 363 (1938).

50 26 N. Y. U. L. Rev. 405 (1951). The article was a revision of sections of a report Smith submitted to the Business Advisory Council of the Department of Commerce in 1950.

remote from the realities of industrial life. It is in the middle ground between perfect competition and complete monopoly that public policy must contend with business behavior. According to Smith, public policy should be directed towards maintenance of effective, not pure, competition. Not all competition is good; not all is bad. Big business is not to be confused with monopoly. But in separating the sheep from the goats he would rely primarily on performance. Competition, whether among industrial pygmies or industrial giants or between the two groups, is effective when it performs well. "It should be presumed that competition is of the good kind when actual performance shows that there is a healthy condition, judged by actual creation of adequate alternatives in goods, services and markets for both buyers and sellers." [51]

Despite the vagueness of effective competition's performance test, Smith would incorporate the standard of effective competition into an antitrust statute to be enforced under a "new Rule of Reason." [52] Smith's concept did not gain in precision as he translated it into a statement of policy, but the translation made it clear that Smith is no slavish devotee of competition and is willing to substitute the public welfare as the goal of antitrust policy: "The object of such policy would be stated to be to encourage such competitive performance as would tend to serve the public interest in providing more and better relative values in goods and services for more people in proportion to human effort." [53] Smith listed the following "relevant circumstances" his new rule of reason would require courts and administrators to consider "[i]n determining whether any commercial practices or courses of conduct promote Effective Competition or are *unreasonably* injurious thereto":

> such actual or probable results of the conduct, under like circumstances in the market, as the increase or decrease of: (1) alternatives available to customers or sellers; (2) volume of production or services; (3) quality of the services or goods; (4) number of people benefited; (5) incentives to entrepreneurs; (6) efficiency and economy in manufacturing or distribution;

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51 *Id.* at 412.

52 *Id.* at 429.

53 *Ibid.*

(7) the welfare of employees; (8) the tendency to progress in technical development; (9) prices to customers; (10) conditions favorable to the public interest in defending the country from aggression; (11) the tendency to conserve the country's natural resources; (12) benefits to the public interest assuming the relief requested by the government in the proceedings.[54]

The Business Advisory Council of the Department of Commerce adopted Smith's ideas with little modification, and in its report to the Secretary of Commerce in 1952 it recommended drastic changes in administrative standards and procedures under the antitrust statutes.[55] Like Smith, the Council would set up effective competition as a standard of business performance and administer it under a rule of reason. The Council recognized inconsistencies in the antitrust statutes vexing to businessmen; it regarded bigness as a relative concept and contended that a big economy requires big enterprise, and it lamented a growing tendency to confuse bigness and monopoly. It proposed the creation of a Review Board, consisting of competent businessmen, engineers, economists, and non-prosecuting lawyers, "to insure that government commencement of Antitrust cases conforms to national policy," [56] and that no government agency begin a major investigation or proceeding until the Board had made its recommendations. In these and other ways the Council would have modified antitrust laws and their administration to make them conform better to the structure and functioning of the contemporary economy. The Council's recommendations aimed at making the laws consistent with market structure and business practices rather than making structure and practice conform to the law.

Oppenheim's role in the struggle to inject the concept of workable competition and the rule of reason into the antitrust laws is too well known to require much comment. His 1952 article, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," [57] engendered the creation of the Attorney General's National

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54 *Id.* at 441. (Emphasis added.)

55 U. S. Dep't of Commerce, *Effective Competition: Report to the Secretary of Commerce by His Business Advisory Council* (1952).

56 *Id.* at 3. (Emphasis in the original omitted.)

57 50 Mich. L. Rev. 1139.

Committee to Study the Antitrust Laws and furnished a blueprint for its deliberations. The Attorney General appropriately appointed Oppenheim to serve as co-chairman of the committee with Assistant Attorney General Barnes, head of the Antitrust Division of the Department of Justice. Oppenheim in his article lamented the tendency of administrative agencies and the courts to broaden the scope of the *per se* violation doctrine and to "dilute the Rule of Reason . . . approach";[58] he was disturbed by the alleged inconsistencies between the Robinson-Patman Act and its administration and the Sherman Act; and he deplored the contradictions in judicial interpretation of Section 2 of the Sherman Act. Like Smith and the Business Advisory Council he found present antitrust laws incompatible with the effective operation of a virile, dynamic, private enterprise economy in which big business has come to play an increasingly important role. Like Smith and the Council he saw in the principle of workable competition administered under a rule of reason a standard by which the performance of American industry could be gauged and by means of which the antitrust statutes might be made sufficiently flexible to meet the needs of dynamic capitalism. Oppenheim's discussion of the need for change in the antitrust statutes was broader in scope and more penetrating in analysis than Smith's, but it also was vague and at times confusing.

In applying the rule of reason to and determining the workability of any particular industrial arrangement, Oppenheim would have the administrative agencies and the courts "consider all of the relevant economic factors bearing upon the interaction of structure, behavior, and accomplishments."[59] But he did not always make clear whether judgment of workability is to rest on the effects of the arrangements on competition or on the public welfare. Proponents of competition have generally assumed that its promotion is identical with promotion of the public welfare, and the neoclassical economists have built a substantial foundation for this belief. It is by no means clear that either Oppenheim or Smith subscribes to it. Oppenheim believed that "[i]n particular factual situations, evidence of legal, economic, and social justifications" should be "weighed under close judicial scrutiny to

[58] *Id.* at 1156.

[59] *Id.* at 1190.

arrive at a determination of whether the restrictions are reasonable or unreasonable when measured against the effects upon competition."[60] I take this to mean that promotion of the public welfare might involve some sacrifice of competition and that under the antitrust laws as Oppenheim would shape them the courts and administrative agencies should have discretion to choose between such alternatives.[61] At any rate, while I am not always sure that I understand exactly what Oppenheim is saying, I have no trouble in reaching the conclusion that under his rule of reason and concept of workable competition the antitrust laws would be less vigorously enforced than I should like to see them.

THE ATTORNEY GENERAL'S ANTITRUST COMMITTEE

Oppenheim's article bore fruit. A year after its publication the Attorney General announced his intention to establish a National Committee to Study the Antitrust Laws. Except for the way in which it was financed, the Attorney General's Committee conformed closely to the Oppenheim model in its objectives, its composition, its procedures, and the scope of its analysis. Within less than two years after its appointment (the maximum time Oppenheim had allowed for the work of his committee), it made its report.[62]

The committee's report may prove to be a significant document in the interpretation and administration of the antitrust statutes. What the committee refrained from doing directly, it may have achieved by indirection. Despite the fact that demand for amendment of the law to incorporate the concept of workable competition and the rule of reason occasioned the committee's creation, the committee not only did not recommend such a change, it specifically rejected the "theory," cautioning that it "does not provide a standard of legality

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60 *Id.* at 1160.

61 Specifically, Oppenheim proposed the substitution of a *prima facie* case of illegality for the *per se* violation rule in the field of restrictive agreements. "When all of the evidence is introduced, the trier of fact would then apply the Rule of Reason to the entire record. He would exercise discretion in evaluation of this evidence to arrive at a value judgment. . . ." *Id.* at 1159.

62 *Report of the Attorney General's National Committee to Study the Antitrust Laws* (March 31, 1955) (hereafter *Report of the Attorney General's Committee*).

under any of the antitrust laws." [63] It is not clear whether this position is due to the inability of a majority of the fifty-two lawyers on the committee to persuade a minority of their group, the single labor leader, and the eight economists to recommend the change, or to their recognition of the almost insuperable task of persuading the Congress to legislate it. But the victory of those who oppose such recommendations is more apparent than real. Having shut out workable competition at the front door, the committee brought it in by the back. It recognized that the concept "provides the courts with tools of analysis in making the factual inquiry into problems of competition and monopoly. . . ." [64]

The committee's recommendations for change in the antitrust statutes were with few exceptions relatively minor, but its advice to the courts and administrative agencies was of profound significance. Despite having been established "to evaluate the antitrust laws in their fundamental aspects," [65] the Committee undertook the simpler and perhaps more congenial tasks of analyzing "the main course of . . . antitrust policy, its interpretation and decisions," evaluating these developments, and reaching conclusions that will serve "as future guides to enforcement agencies, Congress, and the courts." [66] The Committee expressed the hope that from its clarification of the statutes and decisions "will emerge more practical guides for business seeking to comply with the antitrust laws and for Government officials charged with enforcing their prohibitions." [67] In its analysis of trends in the application of the statutes, the Committee commended the courts when they examined all of the relevant economic factors to determine their significance to public welfare, and it looked with skepticism on decisions applying the doctrine of *per se* violation. About the significance of this, Blackwell Smith, a Committee member, has said: "Out of it all comes the most realistic set of standards for legal

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[63] *Id.* at 316.

[64] *Ibid.*

[65] Barnes and Oppenheim, "Organization of the Attorney General's National Committee to Study the Antitrust Laws" 3, Statement prepared for delivery before American Bar Association, Section on Antitrust Law, Boston, Mass., U. S. Dep't of Justice Release (mimeographed), Aug. 27, 1953

[66] *Report of the Attorney General's Committee* 3.

[67] *Id.* at 4.

and socially acceptable competition since the Business Advisory Council Report on Effective Competition published by Secretary of Commerce Sawyer."[68] The report, said Smith, "should be a bench mark for a long time to come against which to make comparisons of decisions, administrative actions, and legislation to see how far they drift from true readings."[69]

To help keep the courts on the narrow path of truth, Oppenheim arranged for copies of the report to be supplied to all federal judges.[70] How influential the document may prove remains to be seen, but Oppenheim has written, "[I]n my opinion the report is commanding the respect and serious consideration of the bar and Government officials."[71] A former Assistant Attorney General in charge of antitrust has corroborated this opinion, saying:

> [T]he effect of the report is unquestionably very significant when you are arguing a case in court. . . . After all, a large committee of supposedly expert people will inevitably have an effect upon the courts.[72]

Economists Question Concept as an Antitrust Standard

The foregoing account traces the more important steps in the effort to inject the principle of workable competition into the administration of antitrust statutes. Economic theory gave impetus to the effort, but economists generally have not given it their wholehearted support, and some have viewed it with great skepticism. They have seen in it an effort to temper the vigor of antitrust enforcement—to provide a legal environment within which contemporary business practices are secure. Most articulate among the skeptics are Edwards, Stigler, Lewis, Adams, Kahn, and Dirlam.

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68 Smith, "Antitrust Report to Narrow Gap between Law and Economics," *Trade Practice Bulletin*, May 1955, p. 4.

69 *Id.* at 1.

70 Testimony of S. Chesterfield Oppenheim, *Hearings on Price Discrimination before House Select Committee on Small Business*, 84th Cong., 1st Sess. 194-95 (1955).

71 Letter dated Aug. 1, 1955 to unidentified addressee, *id.* at 194.

72 Testimony of Thurman Arnold, head of Antitrust Division of U. S. Dep't of Justice from 1938 to 1943, *id.* at 5, 6.

Edwards in a discussion of "Public Policy and Business Size" [73] criticized vigorously the use of the performance test in antitrust proceedings. He pointed out that

> we accept competitive policy because we believe that the performance of business under competition is generally better than otherwise. Competition is properly regarded as the means and good economic performance as the end.[74]

To judge the social acceptability of a monopoly on a basis of its performance would be as unworkable "as to decide whether a driver is permitted to run a red light in traffic by determining whether, on balance, he is a good or bad citizen." [75]

Stigler in condemning workable competition as a criterion in antitrust proceedings quoted with approval the opinion expressed by unidentified minority members of the Attorney General's Committee on Antitrust who said:

> [We] stress that the "doctrine" of workable competition is only a rough and ready judgment by some economists, each for himself, that a particular industry is performing reasonably well —presumably relative to alternative industrial arrangements which are practically attainable. There are no objective criteria of workable competition, and such criteria as are proffered are at best intuitively reasonable modifications of the rigorous and abstract criteria of perfect competition.[76]

Lewis in criticizing the performance test showed commendable insight when he said:

> I am willing to accept considerable leeway and tolerance in the operation of competition (or any other regulatory force, for that matter), but I am not willing to judge its effectiveness or

[73] 24 J. of Bus. of U. Chi. 280 (1951).

[74] *Id.* at 285.

[75] *Ibid.*

[76] Stigler, "Report of the Attorney General's Committee on Antitrust Policy: Discussion," 46 Am. Econ. Rev. (Proceedings of the American Economic Association) 504, 505 (1956), quoting *Report of the Attorney General's Committee* 339.

> to decide whether or not it is workable and working solely or even largely on the basis of "results." . . . Results alone throw no light on the really significant question: have these results been *compelled* by the system—by *competition*—or do they represent simply the dispensations of managements which, with a wide latitude of policy choices at their disposal, happened for the moment to be benevolent or "smart"? This points up the real issue.[77]

Adams in a discerning article published in 1954, "The 'Rule of Reason': Workable Competition or Workable Monopoly?",[78] took sharp issue with Oppenheim and the Business Advisory Council on the usefulness of the concept of workable competition under a rule of reason as an antitrust standard. He exposed the flimsy nature of the argument that the antitrust laws are an uncertain guide to business behavior, showed how the proposed revisions when applied to price-fixing agreements would lead to a cartelization of American industry, pointed out the logical relationship between industrial structure and business behavior, and indicated the treacherous character of industrial performance as a standard for judging the legality of oligopolistic market arrangements. Recognizing that "there are unresolved problems in applying the per se doctrine of Section 1 and the market structure test of Section 2," Adams rightly concluded that the twin approach of workable competition and the rule of reason was not "well calculated to resolve these problems in a manner consistent with traditional antitrust objectives." [79]

Dirlam and Kahn jointly presented their views on the pitfalls in testing the legality of antitrust violations by the concept of workable competition in a penetrating analysis, *Fair Competition: The Law and Economics of Antitrust Policy* (1954). Kahn had done so separately in an article, "Standards for Antitrust Policy." [80] Like other economists, Dirlam and Kahn recognized that pure competition is

[77] Ben W. Lewis, "The Effectiveness of the Federal Antitrust Laws: A Symposium," Keezer, organizer, 39 Am. Econ. Rev. 689, 706, 707 (1949). (Emphasis in the original.)

[78] 63 Yale L. J. 348 (1954).

[79] *Id.* at 370.

[80] 67 Harv. L. Rev. 28 (1953).

an abstraction and that a realistic antitrust policy will have to content itself with "workable competition." They apparently regarded neither monopoly nor oligopoly as inconsistent with workable competition but believed that the traditional antitrust approach provides a more effective method of "preserving workable competition" than "the policy implications of the new economic criticism." [81] They specifically rejected market structure and industrial performance as tests of the workability of competition. In rejecting the former they stated:

> If monopoly elements inevitably pervade the economy, and are in some measure essential to a good performance, it would clearly be quixotic to attack monopoly as such. If the courts were really prepared now to outlaw "the power to raise prices," . . . few industries would be exempt. The economy would have to be "purified" right out of the twentieth . . . century.[82]

And, they concluded, "there exists no generally accepted economic yardstick *appropriate for incorporation into law* with which objectively to measure monopoly power or to determine what degree is compatible with workable competition." [83] They recognized that the adoption of the vague market performance test would weaken the legal safeguards of competition and provide defendants in antitrust cases with innumerable loopholes. They were unreservedly against it.

But although Dirlam and Kahn rejected structure and performance as tests of acceptable competition, they by no means despaired of effective antitrust enforcement in a society shot through with monopoly. What the antitrust acts should do is to insure fair play among firms, big or little. As they viewed it, workable competition is more or less synonymous with fair competition. Courts must look to the way business firms play the game to determine violations of the antitrust statutes. Conduct and intent are the only acceptable criteria for determining violations of antitrust. In many cases "intent alone 'fills the bill' for a sensible antitrust policy." [84] In other cases conduct is more indicative.

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[81] *Op. cit. supra* note 9, at 31.

[82] *Ibid.*

[83] *Ibid.* (Emphasis in the original.)

[84] *Id.* at 51.

> The quest for an explanatory intent does not involve psychoanalysis. The question is not: "Why did A really do what he did?" but simply: "What was A really doing? Was he competing or was he suppressing competition?" [85]

In short, to Dirlam and Kahn "[t]he function of antitrust can only be to see to it that no one attempts to stifle or pervert the process of competition by collusion, by unreasonable financial agglomeration, or by exclusion. Illegality must inhere in the act, not in the result." [86]

My Position on Workable Competition

Although not always agreeing in detail with the economists who have explicitly rejected the concept of workable competition as a criterion for gauging antitrust violations, I too—Dirlam and Stelzer to the contrary notwithstanding—have viewed with oft-repeated skepticism proposals to incorporate the principle into either the administration or the interpretation of antitrust statutes. In analyzing the implications for public policy of Clark's concept of workable competition and Schumpeter's "perennial gale of creative destruction," Watkins and I in 1951 stated:

> The public policy implications of this line of reasoning are fairly obvious. It leads readily to acquiescence in the statuts quo and to a low estimate of the value of remedial action designed to increase the number of sellers and reduce the monopoly elements in industrial markets.[87]

We specifically rejected Clark's contention that oligopolistic pricing serves a sound economic purpose in preventing prices from falling to marginal costs in the short run. We emphasized the function competitive pricing performs in the allocation of resources and in economic progress and challenged the notion that price rigidities are consistent with effective competition. We concluded, "If society wants to preserve a private enterprise economy, public policy must keep the market

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[85] *Id.* at 50.

[86] *Id.* at 49.

[87] ***Monopoly and Free Enterprise*** 99.

free from monopolistic controls, whether they rest on size alone or on conspiracy." [88]

When in 1952 Oppenheim asked me to serve on the Attorney General's Committee to Study Antitrust, I declined the invitation because I was then engaged in testing Oppenheim's hypothesis that the concept of workable competition administered under a rule of reason provided an acceptable standard in antitrust procedures, and I wished to carry on this research unhampered by whatever restrictions service on a public body of this character might impose. The first results of this research were published by the *University of Chicago Law Journal* in an article, "The Rule of Reason, Workable Competition, and the Legality of Trade Association Activities." [89] In this article I first analyzed the concept of workable competition and the rule of reason and reached the general conclusion that the vagueness of both made them unacceptable as standards in antitrust enforcement. I then examined at length, in the light of the rule of reason and the concept of workable competition, the development of antitrust law and its application to the activities of trade associations, demonstrating how deceptive the standards were likely to prove. In commenting specifically on Smith's public welfare test I raised the following question:

> If the good in trade association activity lies in its restriction on competition, how much good should associations be encouraged to do? That is to say, how much restriction on competition is socially desirable? How much restriction on competition leaves it workable?[90]

I indicated that neither I nor other economists had satisfactory answers to these questions, but I observed,

> [I]f businessmen are told that concerted action *may* by restricting competition promote the general welfare, they are entitled to know the appropriate limits of such restrictions. If they are told that concerted action to restrict competition is unlawful, they

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[88] *Id.* at 109.

[89] 21 U. Chi. L. Rev. 527 (1954).

[90] *Id.* at 617.

> proceed collectively at their own risk. Outlawing concerted action to restrict competition is a far more certain guide to business behavior than setting up the vague and debatable principle of *workable competition*.[91]

And I concluded, "[I]f the nation is to rely on 'free private enterprise' to guide economic processes, 'workable competition' applied to concerted action is a dangerous principle." [92] I have not since changed my opinion.

The *Yale Law Journal* published the second of my studies dealing with workable competition, "The Rule of Reason, Workable Competition, and Monopoly." [93] In this study, to which Dirlam and Stelzer refer, I developed in a more precise and rigorous manner criteria for determining the workability of competition, indicating the significance of structure, conduct, and performance. I pointed out that, although many economists believe that together these criteria may afford a useful guide in determining the effectiveness of competition in an industry, "guideposts are no better than the wayfarer's interpretation of them." [94] I also tried to make it clear that the object of an appropriate performance test should be merely to determine whether the arrangement is consistent with competition. I then traced the historical development of the rule of reason as applied to antitrust. I observed that the extent to which the 1911 Supreme Court's distinction between reasonable and unreasonable restrictions on competition had "emasculated the Sherman Act as an instrument for preserving a competitive industrial structure in the American economy is . . . not generally understood." [95] Although rejecting the traditional rule of reason, I recognized that "courts must exercise discretion and judgment, after considering all the relevant facts, in determining whether a contract restrains or promotes competition." [96]

Having developed the standards by which I would apply the rule of reason and the principle of workable competition, I then analyzed

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[91] *Ibid.* (Emphasis in the original.)

[92] *Id.* at 618.

[93] 64 Yale L. J. 1107 (1955).

[94] *Id.* at 1112.

[95] *Id.* at 1125.

[96] *Id.* at 1122.

three industries, steel, tin cans, and cellophane, in each of which the courts in proceedings against the leading producers had found no violation of the antitrust laws.[97a] I examined their structure, the conduct of the alleged law violators, and the industry's performance, to determine whether or not the arrangements were consistent with workable competition as I had developed the standard. In each case I concluded, despite the court's finding that none of the defendants had transgressed the law, that the industry did not conform to "the conception of workable competition developed herein." [97] But in reaching this conclusion I called attention to the danger of a general reliance on the concept in administering antitrust statutes. About this I said:

> It may be difficult to attain an interpretation and application of the concept of workable competition as it has been expounded here Amendment of the law is unlikely to be the solution: many of the advocates of change apparently hope for a gentler, not a more rigorous, application of the statutes to big business. The concept of workable competition is vague, and differences among experts as to its meaning are inevitable. As Mason has suggested, the preconceptions of the analyst as well as the facts may influence his judgment on the competitive workability of any particular arrangement.
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> If amendment of the Sherman Act is an inadequate solution, judicial broadening of the act to include the concept of workable competition, however desirable it may seem in theory, may not prove in fact a more promising remedy. As has been pointed out, without any change in the statute the doctrine of workable competition is creeping into the decisions. This is strikingly evident in Judge Leahy's decision in the *Cellophane* case, which reveals how a superficial understanding of the concept and its application to a particular set of facts may defeat the objectives of the Sherman Act. If this decision becomes a precedent, it will be difficult to establish the existence of monopoly in any industry confronted by rival products that for some uses may be

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97a *United States* v. *United States Steel Corp.*, 251 U. S. 417 (1920); *United States* v. *American Can Co.*, 230 Fed. 859 (D. Md. 1916); *United States* v. *E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953), *aff'd*, 351 U. S. 377 (1956).

97b Stocking, *supra* note 93, at 1146.

substitutable and among which a vigorous rivalry appears to exist.[98]

Dirlam and Stelzer's Criticisms

In criticizing the Mueller-Stocking analysis of the *Cellophane* case Dirlam and Stelzer started with a basic error that led to much discussion that would otherwise be irrelevant. They objected to our alleged use of the concept of workable competition in judging the legality of du Pont's alleged cellophane monopoly. But this is a straw man of their own contriving. That they set him up is not difficult to understand, but it is hard to justify. It may be that I have unwittingly contributed to their confusion. At any rate they failed to distinguish between what I was doing in the *Yale Law Journal* article and what Mueller and I were doing in the *American Economic Review* article. In the former, as I have just indicated, I undertook to test the usefulness of the concept of workable competition under a simplified rule of reason in determining the economic significance of alleged violations of the antitrust statutes; and despite the findings my analyses led me to in judging the workability of competition in the steel, tin can, and cellophane industries, I concluded that the concept was not very useful: a conclusion that Dirlam and Stelzer ignored. In the *American Economic Review* article Mueller and I were testing the court's findings that du Pont had no monopoly power in making and selling cellophane, not the usefulness of the concept of workable competition.

In the Mueller-Stocking article our analysis was shaped by the major issues in the *Cellophane* case and by the court's findings about them. The Government brought its suit under Section 2 of the Sherman Act, charging du Pont with having attempted and conspired to monopolize and having monopolized the manufacture and sale of cellophane and cellulosic caps and bands. Judge Leahy in his decision pointed out that the charge of having monopolized involved two

[98] *Id.* at 1161-62. In a more recent study, an appraisal of the Report of the Attorney General's Committee, in discussing the committee's recommendations on Section 7 of the Clayton Act, I again made clear my skepticism of the usefulness of the concept of workable competition. I stated: "Clearly, administering amended section 7 in accordance with the rule of reason and the principle of workable competition is unlikely to achieve the goal that Congress set for it: the prevention of further concentration." "The Attorney General's Committee's Report: The Businessman's Guide Through Antitrust," 44 Georgetown L. J. 1, 24-25 (1955).

questions: "1. does du Pont possess monopoly powers; and 2., if so has it achieved such powers by 'monopolizing' within the meaning of the Act and under *United States* v. *Aluminum Company of America*[?] . . . Unless the first is decided against defendant, the second is not reached." [99] Judge Leahy need not have reached the second question because he concluded that du Pont did not possess monopoly power in cellophane. Since Dirlam (in his work with Kahn) had indicated that he does not believe the question, Does a firm have monopoly power? is the definitive one in antitrust proceedings, he might well have criticized the court for undertaking to answer the question. But it is difficult to understand why he should challenge economists for doing so, since the *Cellophane* case in fact turned on this issue and such questions are the stock-in-trade of economists. In directing our analysis to the question we tried to make it clear that we were concerned with economics, not with the law.[100] In answering the question we used the tools our profession has given us, but we did not suggest their usefulness in answering the second question that Judge Leahy raised, namely, Has du Pont monopolized within the meaning of the Sherman Act? This is Dirlam and Stelzer's straw man.

To answer the question, Does du Pont have monopoly power in making and selling cellophane? we tried to set up tests relevant to evidence the trial had developed.[101] We found three: (1) What

[99] *United States* v. *E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41, 54 (D. Del. 1953).

[100] In "The Cellophane Case and the New Competition," 45 Am. Econ. Rev. 29 (1955), at page 32 we stated explicitly, "[W]e do not mean to suggest that its strategy was immoral or *unlawful*." (Emphasis added.) We reiterated on page 34 that we were not concerned with the legality of du Pont's control of cellophane. In the light of these statements I find it difficult to understand how Dirlam and Stelzer can say, "Professors Stocking and Mueller conclude that duPont had a (presumably illegal) [sic] monopoly." "The Cellophane Labyrinth," 1 Antitrust Bulletin 633, 642 (1956). We reached no such conclusion.

[101] Whatever the defects of the Government's development of its case (and I am inclined to agree with Dirlam and Stelzer that a simpler analysis might have been more effective), the defendants introduced all economic data relevant to determining the effectiveness of competition. In fact, Judge Leahy's decision seems to be based on a concept of workable competition and the rule of reason. Dirlam and Stelzer, identifying the concept of workable competition almost exclusively with the performance test, would disagree. They said, "The Judge's consideration of duPont's market performance (an integral part of the measurement of workable competition)

role has business strategy played in du Pont's production and sales policies? (2) Is cellophane a sufficiently differentiated product to have a distinct market, or is its market that of all flexible wrapping papers? (3) Do the trend and level of earnings reflect monopoly power or competition? It is important in evaluating our application of these tests to keep in mind what we were testing, namely, Has du Pont had monopoly power in making and selling cellophane? In most of Dirlam and Stelzer's criticisms of our use of these tests they had in mind their own question, Is the concept of workable competition useful in determining the legality of monopoly? Thus in evaluating our analysis of du Pont's business strategy in protecting its domestic market from the competition of foreign cellophane producers, Dirlam and Stelzer saw in it a test of the industry's performance to determine the monopoly's legality. They similarly judged the significance of du Pont's participation in market-dividing schemes and its quota arrangements under its patent exchange with Sylvania—to prove their point that performance (which they confuse with conduct)[102] is not a useful standard in determining the social acceptability of monopolistic arrangements. In trying to prove their case they found it convenient to agree with Judge Leahy's evaluation of these practices.[103]

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was subsidiary to his conclusion that it was pointless to discuss the monopolization of cellophane because the cellophane market was so narrow that the product could not in any meaningful sense be said to be monopolized." *Op. cit. supra* note 100, at 635. But those who have set up the criteria of workable competition have not limited them to market performance. They have looked to the structure of the industry and to the power of substitutes as means of lessening such monopoly power as a monopolist or as oligopolists might have. This is what Judge Leahy did.

102 Why Dirlam and Stelzer should criticize our use of du Pont's strategy in protecting its domestic market—that is, its business conduct, not the industry's performance—as evidence of its having a monopoly it wanted to protect, is particularly difficult to understand since Dirlam and Kahn, *op. cit. supra* note 9, would make conduct—what a firm is up to—the primary test of antitrust violation.

103 Dirlam and Stelzer's willingness to defend Judge Leahy's findings is pretty good evidence that they were relying on his 381-page opinion (unofficial print), most of which was lifted bodily from the defendant's proposed statement of facts, rather than on the 7,500 pages of testimony and 7,000 exhibits introduced in the case. For example, Dirlam and Stelzer stated, "According to the court, the foreign cellophane was of such poor quality it could not have been successfully imported even without the tariff." *Op. cit. supra* note 100, at 643. The facts are that in 1927 importers had 21 per cent of domestic cellophane sales and in 1928, 24 per cent. Du

In criticizing our analysis of the market for flexible wrapping paper to determine whether du Pont has monopoly power in cellophane, Dirlam and Stelzer attacked both our conclusion and that of their own straw man. In attacking our conclusion they distorted our arguments. They said we conceded "that food packaging business shifts back and forth from one wrapping material to another with *slight changes in product prices;*" [104] and they said this argues, contrary to our findings, for "a very high cross-elasticity of demand between cellophane and its substitutes in some areas." [105] We made no such concession, nor does the record warrant one. What we said was that

> some buyers of packaging materials changed from one kind to another in *trying to get their money's worth.* Some candy makers and some bread bakers, for example, operating on narrow margins in the mid-'thirties switched from cellophane to a less costly wrapper when their other production costs mounted.[106]

So far as the record indicates, the shift was not occasioned by price changes in either cellophane or substitute wrapping materials customarily selling for less than cellophane. The buyers of cellophane, like the buyers of other products, no doubt tried to get their money's worth and to do so compared qualities of cellophane (some of which were unequalled in any other wrapping material) and its price with the qualities and prices of substitutes. No doubt there were marginal buyers who switched from one to the other in response to price changes, just as some did with changes in other costs. But apparently most cellophane buyers were so wedded to the product that du Pont could and did price it independently of the prices of its rivals. It

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Pont Cellophane Co.'s quarterly competitive report, first quarter 1929, Government's Exhibit 431, p. 5677, *United States* v. *E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953). After the reclassification of cellophane in 1929 with the consequent rise in import duties, importers supplied less than 9 per cent of the domestic market. *Ibid.*, fourth quarter 1929, GX 434, p. 5714. After a change in the tariff rate under the Tariff Act of 1930, imports did not amount to as much as 1 per cent in any year up until 1947. GX 182, p. 515; GX 182A, p. 515A.

104 Dirlam and Stelzer, *supra* note 100, at 644. (Emphasis added.)

105 *Ibid.*

106 Stocking and Mueller, *supra* note 100, at 52-53. (Emphasis added.)

did so in both lowering and raising prices, and by its own assertion it did so to increase its profits. In 1948, for example, when its division manager concluded that "if operative earnings of 31 per cent is [sic] considered inadequate, then an upward revision in prices will be necessary," [107] du Pont issued a revised price schedule designed to yield 40 per cent. Operative earnings responded promptly, moving from 27.2 per cent in 1948 to 35.2 per cent in 1949, and to 45.3 per cent in 1950.

The nub of the problem of cross elasticity as Dirlam and Stelzer conceived it in determining the legality of du Pont's cellophane monopoly—their problem, not ours—is to prove that cellophane enjoys "*as much* immunity from competition as aluminum ingot, the only morning newspaper in New Orleans, or first-run movie theaters." [108] Such proof is obviously irrelevant to our problem, Does du Pont have a monopoly in selling cellophane? Even if it were relevant, a quantitative comparison of immunities is beyond the competence of either judges or economists.

So also with their criticism of the Mueller-Stocking conclusion that du Pont's rate of earnings in cellophane (ranging from 18 per cent to 62.4 per cent over a thirteen-year period, and averaging 35.6 per cent) reflects monopoly power: most of their objections stemmed from their preoccupation with the concept of workable competition. But while most of their criticisms are beside the point, Dirlam and Stelzer interestingly enough came to the same conclusion that I had earlier reached about the usefulness of the concept of workable competition as a standard for determining illegality in antitrust cases. They don't think it will work. As they put it,

> Proof that will demonstrate to an economist the existence of monopoly power [the task Mueller and I assayed] . . . is far from showing illegal monopoly power. But a proof that some (unquantified) degree of monopoly power has been economically misused [the task they credited to us] . . . is something that [can] rarely be relied upon to convince anyone but its author, let alone a court of law.[109]

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107 Government's Exhibit 591, p. 7539, *United States* v. *E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953).

108 Dirlam and Stelzer, *supra* note 100, at 644. (Emphasis added.)

109 *Id.* at 648.

The Role of Economic Analysis in Antitrust

In denying the usefulness of the concept of workable competition in determining antitrust violations, Dirlam and Stelzer recognized that they had not disposed of the question of the proper role of economic analysis in antitrust proceedings. Their discussion of this contains some useful suggestions; it also leaves something to be desired. They said that economic analysis may be useful in selecting cases for action and in fashioning decrees. And that is all. Although they indicated clearly their skepticism of economic analysis as a basis for determining the legality of alleged antitrust violations, they stated the principle on which they would apply the Sherman Act only in general terms: "Guilt or innocence in Sherman Act cases must inevitably be determined by the courts from an application of the traditional legal appraisal of the character of conduct, and its associated intent."[110] Dirlam and Kahn have elsewhere expounded the principle in more detail. As indicated earlier in this article, they look to the traditional application of the rule of reason to insure the sort of competition the antitrust statutes contemplate. In elucidating this principle they quoted with approval Chief Justice White's finding in the *Standard Oil* decision that the antitrust laws condemn

> all contracts or acts . . . *unreasonably* restrictive of competitive conditions, either from the nature . . . of the contract or act or where the surrounding circumstances were such as . . . to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce. . . .[111]

Throughout *Fair Competition* they reiterated that only through the traditional approach can a reasonable and a reasonably effective administration of the antitrust laws be expected. I have discussed elsewhere the history and significance of the rule of reason in antitrust cases. It was the rule of reason that identified intent with bad conduct and led to a distinction between good and bad monopolistic combina-

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110 *Id.* at 634.

111 Dirlam and Kahn, *op. cit. supra* note 9, at 49-50. (Emphasis in the original omitted; emphasis added.)

tions; it was the rule of reason that allowed the courts to ignore structure and the relationship between structure and business behavior; and it was the rule of reason as set forth in the *Standard Oil* and *Tobacco* cases of 1911 and as subsequently applied in the *American Can, United Shoe Machinery, United States Steel, International Harvester,*[112] and other leading cases growing out of the Great Combination Movement that validated an industrial structure inconsistent with the objectives of the Sherman Act.

Although intent as evidenced by conduct may be useful in passing on the validity of arrangements that may injure competition, unfortunately there is no simple formula for determining good conduct. More important, the motives for business behavior and the behavior itself may by any reasonable legal standard be wholly exemplary, yet the conduct may tend to lessen the vigor of competition. The motives behind the business decisions that led to the Great Combination Movement were diverse and obscure. Promoters sought speculative profits; bankers sought the stabilization of security values; businessmen sought relief from the vigor of competition; industrial engineers sought economies of management and integration. But the result of these mixed motives was an industrial structure shot through with monopolistic restraint—for which the Sherman Act under the 1911 rule of reason was no remedy. Moreover, the application of the rule in subsequent cases accelerated and accentuated the merger movement of the 1920's. The motives behind the merger movement of the 1950's are perhaps more mixed than those that characterized the earlier movements. Tax savings, security through diversification and integration, a sure supply of raw materials, economical entrance into new fields and new geographic areas, economical expansion of plant—these are among the major motives of the contemporary merger movement. Clearly the traditional antitrust approach is inadequate to grapple with such a movement.[113] The

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[112] *Standard Oil Co.* v. *United States,* 221 U. S. 1 (1911); *United States* v. *American Tobacco Co.,* 221 U. S. 106 (1911); *United States* v. *American Can Co.,* 230 Fed. 859 (D. Md. 1916); *United States* v. *Winslow,* 227 U. S. 202 (1913); *United States* v. *United Shoe Machinery Co.,* 247 U. S. 32 (1918); *United States* v. *United States Steel Corp.,* 251 U. S. 417 (1920); *United States* v. *International Harvester Co.,* 274 U. S. 693 (1927).

[113] Although Dirlam and Kahn stated as a general principle that neither structure nor performance is of significance in determining violation of the antitrust laws

courts and the Congress cannot ignore consequences if the country is to preserve an industrial structure consistent with effective competition. There is no evidence that when General Motors bought out a little diesel engine company and a small locomotive manufacturer in the 1930's it sought to monopolize the locomotive field. Quite the contrary. It did battle with a quasi-decadent monopoly in steam locomotives. Today General Motors makes about 70 per cent of all locomotives sold in this country. It probably has not sought monopoly, but its power as one of the biggest buyers of railway services is a distinct asset in selling diesel locomotives. No purchaser of railway equipment can overlook the fact that in buying from General Motors he is dealing with a powerful customer, and he would be somewhat less than human if he were not influenced by it. General Motors no doubt is one of the country's most efficient producers of automobiles, but its chief advantage over smaller rivals may be that it gets better deals in buying, not because it is more efficient but because it has power in the market. What is true of General Motors is more or less true of other large concerns. The point is that refusing to examine economic consequences means failing to grapple effectively with the problem of structure. This, of course, does not imply undertaking to "purify the economy out of the twentieth century," but it does mean that believers in free enterprise cannot shut their eyes to the relationship between structure and competition.[114]

Certain antitrust prohibitions obviously require the examination of economic consequences. Section 7 of the Clayton Act prohibits

(*op. cit. supra* note 9 at 44), at times they conceded that the courts and the Federal Trade Commission must consider economic consequences in enforcing the Clayton Act. Despite noting specific exceptions (e.g., p. 231 n. 42), however, they never abandoned their main thesis. They concluded their analysis with the declaration. "We are unsympathetic to proposals for reorganizing market structures to make them more purely competitive. . . ." *Op. cit. supra* note 9, at 284.

114 Dirlam and Kahn's own failure to recognize the full significance of this relationship led them to accept the court's remedies in the *National Lead* case. The conduct of the National Lead and du Pont companies clearly indicated an intent to monopolize titanium in the domestic market. They participated in a cartel so tight that in the words of the district court, "It was more difficult for the independent outsider to enter this business than for the camel to make its proverbial passage through the eye of a needle." *United States* v. *National Lead Co.*, 63 F. Supp. 513. 521 (S. D. N. Y. 1945), *aff'd*, 332 U. S. 319 (1947). Yet the district court and the Supreme Court, ignoring structure and its relationship to conduct, were content with a mere injunction against the unlawful acts, as apparently are Dirlam and Kahn.

mergers that may lessen substantially competition in any market. Section 2 prohibits price discrimination where the effect may be to lessen substantially or to injure competition. Motives may be pure, conduct immaculate, yet mergers and price discrimination may wipe out competition. To recognize this is not to justify an economic analysis that makes enforcement impossible. The Federal Trade Commission's thorough-going inquiry into all the economic ramifications of Pillsbury's acquisition of Ballard and Ballard and Duff may comfort those who believe in the utilization of the standard of workable competition in antitrust administration, but such a procedure in the enforcement of amended Section 7 promises to emasculate it.[115]

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[115] Although the *Pillsbury Mills* opinion rejected the "quantitative substantiality" test and found *prima facie* evidence of Section 7 violation in Pillsbury's acquisition of Ballard and Ballard and Duff, the Commission recognized that its obligation under the statute was to determine the probable effects of these acquisitions on competition. To do this in merger cases, it declared, "[t]here must be a case-by-case examination of all relevant factors in order to ascertain the probable economic consequences." *Pillsbury Mills, Inc.*, F. T. C. Dkt. 6000 (1953), p. 9. Commissioner Mead, concurring, objected to the all-embracing character of the economic inquiry contemplated, saying, "The facts to be determined may be so apparent that a reasonable man could fairly decide the issues without the benefit of extensive data." Federal Trade Commission Release, Jan. 18, 1954, p. 3. The significance of Chairman Howrey's requirement, on behalf of the Commission, of an extensive economic inquiry can only be fully understood by reference to what Howrey has said elsewhere on the importance of economic evidence in antitrust cases. While recognizing that the tests in a merger case under amended Section 7 of the Clayton Act might be "quite different from those in a restraint of trade case brought under section 5 of the Federal Trade Commission Act," he discussed the tests which should be applied in antitrust cases arising under these statutes without distinguishing between them. "Economic Evidence in Antitrust Cases," 19 J. of Marketing 119, 120-21 (1954). In doing so he stated, "It is recognized that the public policy of the antitrust laws is governed by the reality that imperfect competition exists in most competitive markets. This concept, particularly when accompanied by a rule of reason approach, is sometimes referred to as 'workable' or 'effective' competition." *Id.* at 121. He then laid down sixteen tests relevant to determining "whether or not competitive conditions in a particular market comply with the requirements of the antitrust laws." *Ibid.* These tests included consideration of business conduct, market structure, and performance. Howrey made it pretty clear that he would apply the principle of workable competition under the rule of reason in the administration of the antitrust laws. In the light of this it is surprising that Dirlam and Kahn, who reject structure as evidence of the unworkability of competition, commended the Commission for its use of structure in finding a *prima facie* case against Pillsbury and saw in the Commission's remand calling for a painstaking and thorough economic inquiry no application of the principle of workable competition and no threat to a vigorous enforcement of Section 7. *Op. cit. supra* note 9, at 282-83.

As Mason has indicated, pushing economic inquiry very far is "an invitation to non-enforcement;" [116] but so is reliance solely upon intent and conduct. In some cases *per se* rules may afford the best method of preserving competition. In other cases economic inquiry must be carried to the point where a reasonable inference may be reached as to whether the business arrangements promote or hinder competition. That is far enough.

Dirlam and Kahn, although overemphasizing the adequacy of intent and conduct in judging the legality of business procedures, recognized that economic analysis cannot be dispensed with entirely in the administration of the antitrust laws. In criticizing the Federal Trade Commission's finding in certain price discrimination cases they found:

> The trouble is that the Commission itself provided precious little evidence in the latter cases that it had made even the necessary appraisal of offsetting benefits and costs of its decisions and orders. . . . [B]y failing . . . to consider seriously the economic consequences of its orders or the possibility of achieving the desired results at less economic cost by a different kind of order, in short, by being more legalistic than the courts, the Commission was apparently intent on destroying its own *raison d'etre* as an expert, flexible administrative agency.[117]

Dirlam and Stelzer might well concede what Dirlam and Kahn affirmed. In truth it may be that they contemplated such when they stated: "That the anti-trust implications of behavior and intent must of course be interpreted against a background of analysis of economic power of the firm and structure of the industry goes without saying." [118] But whether or not Dirlam and Stelzer agree with Dirlam and Kahn, they can scarcely challenge the professional propriety of economists' utilizing the vast resources of economic data that antitrust cases develop to determine whether competition or monopoly characterizes an industry.

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116 Mason, "Market Power and Business Conduct: Some Comments" (Report of the Attorney General's Committee on Antitrust Policy), 46 Am. Econ. Rev. (Proceedings of the American Economic Association) 471, 475 (1956).

117 Dirlam and Kahn, *op. cit. supra* note 9, at 254.

118 Dirlam and Stelzer, *supra* note 100, at 634.

Although Dirlam and Stelzer understated the role of economic analysis in antitrust proceedings and incorrectly alleged Mueller's and my acceptance of the concept of workable competition as a guide, they did not overemphasize the threat that utilization of the concept—particularly when identified with industrial performance—represents to effective antitrust enforcement. But they failed to recognize what the Supreme Court minority opinion in the *Cellophane* case clearly discerned, that structure may be evidence of the lack of competition. In the language of Chief Justice Warren's dissent, in which Justices Black and Douglas joined:

> This case, like many under the Sherman Act, turns upon the proper definition of the market. In defining the market in which du Pont's economic power is to be measured, the majority virtually emasculate §2 of the Sherman Act.
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> . . . .
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> The conduct of du Pont and Sylvania illustrates that a few sellers tend to act like one and that an industry which does not have a competitive structure will not have competitive behavior. The public should not be left to rely upon the dispensations of management in order to obtain the benefits which normally accompany competition. . . . Only actual competition can assure long-run enjoyment of the goals of a free economy.[119]

[119] *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 414, 426 (1956).

NEW COMPETITION IN THE OLD WORLD

by

ROBERT SOLO* and ERNST HEUSS**

Introduction.

It has long been considered that the United States had a monopoly of active antimonopoly policy. Since the end of World War II, however, there has been a sharp awakening in the sentiment and action directed against restraints of trade in countries outside the United States. Thus since "the end of the second World War, in some thirty other countries, constitutional provisions or legislative measures have been adopted or proposed which contemplate a stronger national policy for the prevention and control of restrictive practices . . ." [1] This essay will examine the phenomenon of a resurgent antimonopoly policy in selected countries outside of the United States.

Canada.

Monopoly and the intent to monopolize has been a crime in Canada since 1889, but prior to World War II Canadian antimonopoly prosecutions were few and trivial in their economic impact.[2] An important change in enforcement policy occurred after the war, possibly in response to the rapid growth of a strong industrial economy in Canada which was no longer the subsidiary of American and British business, but which must be shaped into competitive form by an independent Canadian policy—if it was to be so shaped at all. Following the report of the MacQuarrie Committee in 1952, Canada's agency of antimonopoly enforcement was reformed and re-enforced. It has now two branches, a "Director of Investigation and Research," and a "Restrictive Trade Practices Commission." The Director and his staff investigate alleged offenses and bring

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1 Sigmund Timberg "Restrictive Business Practices" *American Journal of Comparative Law*, vol. II, 1953, p. 457.

2 For an historical summary of legal development, cf. D. Gordon Blair "Combines Control and Competition" *Canadian Bar Review* 1953, p. 1083.

offenders before the Commission. The three man Commission sits as a judicial body, hears the arguments of the prosecution and of the defense, and puts before the Minister of Justice its recommendations as to whether the accused should be prosecuted in the courts.[3]

Prosecutions in Canada under this system have been moderate and cautious, but diligent and of growing effectiveness. Hitherto prosecutions have been practically limited to price-fixing agreements and related practices, *i.e.*, "Canadian enforcement has been so far concerned chiefly with arrangements among separate firms which were overtly collusive."[4] Recently, however, cases have been fought and won, which lay the basis for a considerable extension of anti-monopoly enforcement. Especially significant has been the move since 1950 against mergers and monopoly. The high point of this new antitrust action was the successful prosecution of the Canadian match monopoly started in 1951, with conviction uphelp by the Supreme Court in 1954.[5] Inasmuch as illegal intent, indicated by coercive practices and a comprehensive scheme to attain the forbidden monopoly power is relied on by the prosecution and by the courts, the case is analogous to the original trust-busting prosecutions in the United States in the first decade of the twentieth century. The existence and exercise of monopoly power *per se* has not yet been dealt with in Canada.

In the *Eddy Match* case the defendants were found guilty and were fined, but their monopoly power was not broken or checked (except by a deliberated reduction of the tariff on matches). This was because the Government, having successfully shown that a monopoly had been illegally established, was without the power either to dissolve that monopoly or to enjoin the continuation of practices considered monopolistic. This impotence derived from the special constitutional structure of Canada wherein the Federal Government

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[3] Cf. L. A. Skeoch "The Combines Investigation Act: Its Intent and Its Applications", also Stefan Stykolt "Combines Policy: An Economist's Evaluation", both articles in *The Canadian Journal of Economics and Political Science*, February 1956.

[4] *Annual Report*, Combines Investigation Act, by the Director of Investigation and Research (Ottawa) 1954, p. 3.

[5] *Rex* v. *Eddy Match Co. Ltd.* (1951) and *Eddy Match Co. Ltd. et al.* v. *the Queen* (1954) 109 C. C. C. 1.

can regulate monopoly only on criminal grounds and is hence deprived of the remedies automatically available in civil action. It was therefore necessary during the 1953-54 session of Parliament to amend the Combines Investigation Act so as to give the courts special prohibitory powers in antitrust actions. The constitutionality of this amendment was upheld by the Canadian Supreme Court this year.

There is vigorous opposition to the extension of an effective policy of enforcing competition in Canada today. The idea of a *per se* illegality even of "reasonable" monopoly is hard for some lawyers, academicians and certainly for many businessmen to swallow.[6] It is nevertheless the opinion of this observer that antimonopoly policy in Canada is rooted to stay, and that it is bound to grow in breadth and effectiveness. In important respects the future of Canadian antitrust policy is fraught with fewer difficulties than those which plague effective antitrust enforcement in the United States. Its administration is unified, with powers concentrated and related directly to ministerial responsibility. The courts, less a dominant force in Canada, have not so far proven, and are less likely in Canada than in the United States to prove, a barrier to effective antitrust prosecution if such is desired by the Crown. Nor is Canada so much caught in the cross-fire of values such as are reflected in the United States in the simultaneous existence of effective antitrust enforcement and the legalized elimination of competition under the Fair Trade Laws

Great Britain.

In 1948 the Monopolies and Restrictive Practices Act was passed in Great Britain. The Act established a Commission to investigate industries designated by the Board of Trade as proported by monopolistic. The Commission was charged with establishing the existence and possible abuse of monopoly power, and with recommending action "in the public interest" appropriate to each case.

This apparent reversal of a long standing policy of lenience towards and even positive encouragement to private monopoly in Britain may be attributed to a number of possible forces. There was a sense of economic weakness and the willingness to experiment in search of a

[6] Cf. W. Friedman "Monopoly, Reasonableness and the Public Interest, *Canadian Bar Review*, February 1955.

means to infuse the needed vigor into the British economy. In this regard the American example was probably important, for American vitality had left a deep impression on postwar Europe, with the consequent high prestige of American policy manifested both in imitation and resentment. The new antimonopoly policy reflected, too, the suspicions and antagonism felt by members of the Labor Party towards the loci of private business power that remained beyond the reach of nationalization.

The new Commission was not so much required to administer a policy as to make one, for the criteria of the public interest offered in the Act as the basis on which public action was to be recommended were so broad, vague and incommensurable as to provide no firm ground for the decisions of the Commission.[7]

Twelve industries have so far been studied and reported on. Much moral suasion but virtually no recommendation for legal coercion was forthcoming in these reports. The impact of these exhortations in stimulating greater competition in the public interest is not recorded. In its general report (the tenth in the series), evidently despairing of the attempt to deal with monopoly through *ad hoc* analysis, and with "appropriate" recommendations to be made without a defined responsibility, without sharp standards by which to judge, without clear rules to enforce, the Commission asked that Parliament enact a code of monopoly restraints forbidden to all.

In response to this request the British Government has proposed a new law embodying a code of forbidden monopoly practices, requiring the registration of agreements, and setting up a special tribunal to adjudicate suits which arise under the new law, and at the same time abolishing the Monopolies and Restrictive Practices Commission.[8]

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7 Harbury and Raskind "The British Approach to Monopoly" *Quarterly Journal of Economics*, August 1953. The authors describe the criteria of the public interest provided to the Commission as follows: "(1) efficient and economic production and distribution at prices that best meet the requirements of the home and overseas markets; (2) progressive encouragement of new enterprise and development of industry; (3) fullest use and best possible distribution of men, materials and industrial capacity; (4) developments of technical improvements and expansion of markets." P. 382.

8 Reported in the New York Times, February 16, 1956. Certain practices will, it is reported, become illegal at once while others may be submitted to a special judicial tribunal for a ruling as to whether or not they may be continued. The bill

Some, in view of the achieved code of *per se* rules, have hailed this as an advance towards a more effective enforcement of competition. Others, partisans of antimonopoly policy, have received the new Act with much apprehension—and for good reasons. The new law abounds in loopholes that might enable a nearly total evasion of enforcement. The standards of the public interest according to which in the terms of the law the monopolist may defend his practices and the tribunal approve them are again so vague, broad and incommensurable as possibly to destroy the value for effective enforcement of an enacted code of *per se* rules. Procedures are cumbersome; one British critic has calculated that it will take the registrar a hundred years to process the agreements which are expected to be filed with him. Conservative leadership is not markedly anxious to press for rigorous antitrust enforcement, and evidently has sought to dampen Labor's enthusiasm by suggesting the possibility that trade unions might be brought within the orbit of prosecution under the law. The most important defect of the law itself, it would seem to this observer, is the lack of a public prosecutor charged with the task of enforcing effective competition and armed with the power to bring evaders of the law to punishment before the bar. Private suits have hitherto never sufficed for this purpose, and there is no reason to suppose that they will suffice now.

Antimonopoly policy is not yet well rooted in Great Britain. The law is weak, and likewise is the intention of the Government. And

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seems to rely for its activating force on suits in private relief. No criminal penalties are provided against infringements, injunctions awarded as remedies in private suits would presumably be used as the instrument of enforcement. In a sense re-enforcing the powers of private monopoly, the bill would give "individual manufacturers . . . the power to bring legal proceedings against those who knowingly infringed their resale price conditions . . . even in cases where there was no contractual agreements." It would be required that agreements covering such practices as price fixing, output control and market sharing be registered. "The judicial tribunal would have the power to determine whether the registered practice was in the public interest and to ban those that are not." The grounds on which these practices may be defended as in the public interest according to the new law are so vague, broad and incommensurable as perhaps to be meaningless. A small committee is substituted for the former Monopolies Commission whose activities are to be confined to "dealing with single company monopolies and agreements relating wholly to exports, but only when such cases are referred to it by the Board of Trade." Restrictive practices in the export trade are specifically exempted from the provisions of the measure. Considering the pervasiveness of the export economy in Great Britain, the significance of this provision as a loophole for all around evasion is likely to be very great.

yet it may be said that the principle and purpose of public action against monopoly restraints is stronger now in Great Britain than it has been since the ebbing away of the ancient and traditional common law and statutory protections that began with the repeal of the Statute of Edward VI in 1772. A Conservative Government, reluctantly perhaps, nevertheless *has* committed itself to the principle of maintaining effective competition, and its actions will be measured against its commitment. The forces behind such a policy are stronger than the prejudices of ministers. Stripped bare indeed the force behind this development is the need for economic rigor as a prerequisite for political survival.

Germany.

Germany is the traditional stronghold of the "efficient" cartel. German economic strength under cartelization provided a rationalization for the surrender to the power of private monopoly in prewar Europe. Cartels were legalized in Germany by a decision of the German Supreme Court in 1897. This basic decision reflects two elements of continuing importance in understanding the antithetical development of American and European policy with regard to monopoly.[9] In this period of the formative development of the law, the cartels which confronted the German courts were in fact associations of small businesses, caught in the stress of financial crisis, and banded together to seek relief from their common plight. In the eyes of the court they were "Kinder der Not", *children of distress,* and it was in thus conceiving of cartels as a protective mechanism of "sick" industries that the German court laid the frame of a legal milieu in which a very different sort of cartel could develop unhampered. The accommodations afforded for the poor *Kinder der Not* were soon occupied by adults of quite a different mien, who came to possess an unparalleled degree of private monopoly power. Contrast this with the initial development of antimonopoly law in the United States. There the courts, and the public, were confronted with the powerful, profitable and ruthlessly coercive "trusts" in the process of battering

[9] For a treatment of the economic background to this decision cf. B. Roper in "Der Wirtschaftliche Hintergrund der Kartell-Legalisierung durch das Reichgericht 1897" Ordo III Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft, Düsseldorf and München 1950. For a treatment to the legal background to the decision cf. F. Böhm *Das Reichsgericht und die Kartelle* Ordo I Düsseldorf and München 1948.

down and swallowing up independent enterprise at an unprecedented rate. It was in conceiving of monopoly as a "trust", rather than as a protective mechanism for sick industries, that in the United States a framework of legal control of combinations in restraint of trade was developed.

The basic decision of 1897 in Germany reflected also the reluctance of the court there to accept, and the underlying public disbelief in, the value of competition. The spirit and philosophy of individualism, manifested in the doctrines of natural rights and the mechanism of representative democracy in the political sphere, and in the doctrines of economic liberalism and the mechanism of the free, competitive market in the economic, never permeated the Central European *Weltanschauung* as it had in the United States. For the German court competition was naturally chaotic, wasteful, mutually ruinous, whereas cartelization appeared in contrast as the means of achieving order and discipline in economic activity. Significantly Germany proponents of antimonopoly now consider the essential social choice as between alternative "economic orders" (Wirtschaftsordnung).[10] They favor the market system as the type of "economic order" in which competition appears as the instrumentality through which economic activity is systematized. With this emphasis on competition as the instrument for the disciplining of economic forces and of imposing an order on economic activities, here, as always, old symbols are marshalled to support new purposes, new medicine is poured into familiar bottles.[11]

In our attempt here to account for the development of an opposite policy towards monopoly in the United States and in pre-war Europe, we would add to the initial identification in Europe of cartels with sick industries, and to the general scepticism in Europe concerning the value of competition, one final element. This, paradoxically, has to do with the large ratio of foreign (or "international") trade

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10 This conception of *Wirtschaftsordnung* was developed in Germany by the so-called "Freiburger Schule" whose founder was the late W. Eucken. Cf. W. Eucken *Grünsatze der Wirtschaftspolitik*, Basel and Tübingen, 1953.

11 In a manner rather reminiscent of the terminological substitution in the United States of "free enterprise" for "capitalism", German partisans of antimonopoly policy use the term "Wettbewerb" to convey the meaning of competition, rather than the former "Konkurrenz" which is replete with negative associations "runinoise Konkurrenz" in the German mind.

as against domestic trade in European countries as compared with the more protectionist and self-sufficient economy of the United States. The large proportion of foreign trade in Europe mitigated against the development of an effective mechanism for the enforcement of competition for two quite different reasons.

For a time European liberals considered the economies of their countries as immune from the dangers of monopoly because of the exposure of these countries to a high degree of competitive pressures through international trade. The "trusts" were taken as peculiarly American, the high American tariffs were called "the mother of the trusts," and it was thought that no such phenomenon could arise in Europe in the face of her extensive foreign trading. The longer existence of international trading pressures delayed the development of political attitudes and legal mechanisms to deal with private monopoly. International trade has provided a salutary force for competition, but that force of competition was destined to be diminished or destroyed, first by a rising protectionism that left local monopolies without outside challenge and without domestic restraint, and second by the interlocking of national monopolies into international cartels. Because of its much higher ratio of internationally traded goods, the onset of a general system of high protectionism had a far more significant effect on national trade in Europe than in the United States. Protected spheres for local monopolies were everywhere carved out, and cartels flourished in the shadow of the tariff walls.[12]

Not only does a high proportion of international trade in Europe help to account for the failure to develop an effective mechanism of antitrust enforcement, but under the regime of protectionism it led to the positive encouragement of certain monopoly practices which were important in direct ratio to the significance of foreign trade. The foreign consumer has always been looked upon as fair game and good sport for the local monopolist. The Webb Pomerane Act was surely one American expression of this sentiment. The powers of the exporting monopolist is regarded everywhere with favor on the assumption that his powers to exploit the foreign consumer to the hilt redounds to the advantage of the exporting nation, *e.g.*, the German

[12] Cf. Gruner "Wirtschaftsverbände und Staat" *Schweizerische Zeitschrift für Volkswirtschaft und Statistik* 1954 No. 1, for an instructive study of the relationship between the development of cartels and the tariff in Switzerland.

Potash Syndicate prior to World War I. At first remove this is true, but alas it is as true on one side of the national fence as on the other. Universal policies of beggar-my-neighbor result in the beggary of all. Nor has it been possible to confine the monopoly power to the export function alone; the power spreads itself and is turned back on the domestic consumer.

With the crisis of the thirties, cartels were encouraged either as instruments for the administration of State policy or, NRA fashion, as agencies for industrial self-government. Germany and Norway introduced compulsory cartels. In Switzerland the power to introduce compulsory cartels remains a part of the constitution.

It is especially remarkable then that Germany, after World War II, should emerge from all this as the strongest partisan of a rigorous antimonopoly policy, in all of Europe. The survival of that policy is by no means assured, for institutions and attitudes rooted deep in history are not easy to reshape. Nevertheless Germany alone has a law on its statute books prohibiting the restraints of monopoly power as such, and Germany is enforcing that law. Germany this year is preparing a new statute to carry on the antimonopoly policy initiated during the period of occupation.[13] In that country alone on the Continent a strong voice exists among economists for the radical extension of antimonopoly enforcement.[14] What are the forces which have given to Germany its special position among all the countries in Western Europe as a proponent of effective competition and as an antitrust partisan?

Antimonopoly policy and the enforcement of that policy were imposed on the Germans by the occupation forces under specific American pressure.[15] The fact that it was imposed, and moreover was associated with dismantling policy and was considered as punitive, was of course no advantage to its continuing popularity. On the other hand it was an advantage for such policy in Germany, as

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[13] *Gesetz gegen Wettbewerbsbeschränkungen*, popularly called "Kartellgesetz".

[14] Cf. F. Böhm "Das Kartelproblem" *Schweizerische Zeitschrift für Volkswirtschaft und Statistik*, 1951, No. 3. Leading proponents of antimonopoly policy include W. Eucken, A. Rüstow, W. Röpke, and F. Meyer.

[15] U. S. Military Government Law 56 (Prohibition of Excessive Concentration of German Economic Power) of February 2, 1947.

compared to other countries in Europe, that Allied enforcement overcame that fear of the untried and the enormous inertia that always stands in the way of launching a genuine departure in social policy. More important were the results. The policy may have been imposed without regard to German sensibilities, but success counts more than sensibilities. And the policy was successful. The breakup of the cartel is associated with all the extraordinary recovery of the postwar German economy, and with the present vigor and expansiveness of that economy.

It has been suggested that antimonopoly policy will fare less well in Germany should that economy move into decline. This is undoubtedly true, in Germany and anywhere else, but it should not be taken as a condemnation of antitrust policy, nor as a signal of any contradictions inherent in such a policy. Economic expansion and effective competition are not alternatives but are interdependent. If effective competition contributes to expansion, then also an expanding economy is a prerequisite to the political acceptability and social value of vigorous competition. The success of German antitrust policy is a part of, and depends on the success of, a larger German policy directed towards maintaining an expanding economy.

Other elements that favored the development of antitrust policy in Germany were the reaction against Nazi regimentation, the political disrepute of many of the former possessors of monopoly power for their Nazi associations, and the failure in the period before the war of an attempt to control the abuses of monopoly while recognizing and accepting the continued existence of monopoly power.[16] Moreover in Germany the attack on cartels is directed against large and powerful enterprise, whereas in other continental countries, and especially in France, the cartel appears still as an association of small operators whose financial position is precarious but whose political power is great.

Other European Countries.

Measures intended to deal with the power of private monopolies have been enacted in many countries of Europe and have taken many

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16 The *Verordnung gegen Missbrauch wirtschaftlicher Machtstellungen* Nov. 2, 1923.

forms. Constitutional provisions in France and Italy provide for the nationalization of "enterprises that have or acquire the character of a monopoly." France and Belgium have enacted specific measures against particular price manipulation. Austria, the Netherlands and Sweden require the registration of intra-industry agreements, relying on restraints imposed on specified practices, plus the publicity attendant on registration. Norway and Denmark require the registration of agreements and attempts to exercise a general supervision over their reasonableness. Other countries are seeking or considering some forms of control.

These measures chiefly manifest a chafing under the restraints that have long stifled European trade, and a sense of the stagnation in European economic development as compared to that of Russia in the east and the United States in the west. But if dissatisfaction is general there is no general accord as to the nature of the desired reform. Workers' parties seek socialization or direct controls over price and output. The interest of the bourgeoisie *qua* producers is too often directly involved in the operation of cartels. Consequently the reform envisaged is, for the time being, very limited in scope, contemplating the elimination of specified coercive practices such as the collective boycott, and in general directed towards requiring a *reasonable* exercise of the monopoly power rather than towards the destruction of the monopoly power. The tale is not yet fully told. Experience will expose the inadequacies of programs. The frustrations that inhere in any attempt to regulate cartels through the *ad hoc* determination of the abuses of a recognized monopoly power will become evident in time. The nations of Europe have at least and at last become conscious of the problem of monopoly, and it may be supposed that their present approach is a first phase in the development of policy that will accomplish the end in view. The example of the United States and of the unfolding experience with monopoly control in Germany, Great Britain, Canada and elsewhere are bound to influence their subsequent course of action.

A more important force for competition in Europe at the moment than the laws directed towards the control of monopoly is the liberalization of European trade and the inauguration of such ventures in co-operative action as the European Steel and Coal Community. In creating a wider trading area, the opportunities for expansion, the

incentives to competition and the effectiveness of competition are increased. There are also dangers for competition in these political instruments of international economic control, for while these instruments can serve to counteract the political barriers to the free flow of trade, they may as well be used to re-enforce and to extend the powers of private monopoly.

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ANTITRUST NEWSLETTER

Supreme Court (Box Score) October 1956 Term (pending as of October 8, 1956)

Dkt. 2—*Holophane Company, Inc.* v. *United States of America* (U. S. D. C., Southern Ohio), June 8, 1955 Appeal filed. Oct. 10, 1955 Probable jurisdiction is noted. Mr. Justice Harlan taking no part, and case now awaiting argument.

A principal question presented by this appeal is whether a district court, upon finding that an American company has conspired with foreign companies to divide world market in violation of Section 1 of the Sherman Act, has the power to direct American company affirmatively to compete in the foreign territory which has been allocated to its co-conspirators.

A second question is whether contracts imposing territorial and other restrictions upon parties to the sale of a business are *per se* violations of the Sherman Act, and whether such contracts become *per se* unlawful when made between corporations formed under the laws of different countries and divide the geographical parts of the world in the markets among the contracting parties.

Dkt. 3—*United States of America* v. *E. I. du Pont de Nemours & Co. et al.* (U. S. D. C., Northern Illinois), June 14, 1955 Appeal filed. Oct. 10, 1955 Probable jurisdiction is noted, Mr. Justice Clark and Mr. Justice Harlan taking no part, and case now awaiting argument. June 11, 1956 Motion to schedule case for December argument denied.

The questions presented are (1) did the acquisition of a controlling stock interest in automobile manufacturer by a chemical company coupled with participation in manufacturer's management have the probable effect of substantially lessening competition between the companies in violation of Section 7 of the Clayton Act, and (2) did the District Court commit error in its findings and conclusions that the

chemical company's acquisition of stock and participation in management of the automobile company constituted a combination in violation of Section 1 of the Sherman Act.

Dkt. 11—*United States Gypsum Company* v. *National Gypsum Company* (U. S. D. C., District of Columbia), Oct. 24, 1955 Appeal filed. Jan. 16, 1956, noted Probable jurisdiction, Mr. Justice Clark taking no part, case now awaiting argument.

The question presented is whether, after a civil antitrust suit in which a conspiracy to fix prices by means of patent licensing had been charged by the United States against USG and its co-defendant patent licensees, a final decree is entered against defendants, but that final decree does not bar and the Department of Justice does not oppose suits by USG to recover reasonable compensation for use made by others of USG patents prior to entry of the final decree, the filing of such suits by USG against the co-defendant patent licensees in the antitrust suit constitute a misuse of USG patents.

Dkt. 63—*Federal Trade Commission* v. *National Lead Co., The Sherwin-Williams Co., The Eagle-Picher Co., Anaconda Copper Mining Co., et al.* (Seventh Circuit), Apr. 13, 1956, Petition filed. June 4, 1956, Petition granted, and case now awaiting oral argument.

Petitioner, FTC, contends that U. S. C. A. 7th Circuit's decision to set aside that portion of the FTC order for respondents to cease and desist in the use of zone pricing methods too narrowly restricts the power of the FTC to prescribe a remedy to end a violation of Sec. 5 of the Trade Commission Act. The 7th C. A. had upheld the FTC findings of conspiracy but rejected the order directed at the individual use of zone delivered pricing. According to the petitioner the 7th C. A. had reasoned that the Commission, not having determined that individual use of a zone delivered price system was unlawful, was without authority to prohibit such use.

Dkt. 94—*William Radovich* v. *National Football League, et al.* (9th Circuit), May 18, 1956, Petition filed. October 8, petition granted and case awaiting argument.

The question presented is whether professional football is exempt from the application of the Sherman Act.

Dkt. 95—*Federal Trade Commission* v. *The American Crayon Company* (6th Circuit), May 18, 1956, the Petition filed.

In a *per curiam* decision of October 8, 1956, the Supreme Court reversed the 6th Circuit decision on remand from the Supreme Court because the 6th Circuit had reversed the entire prior judgment instead of only that part of the judgment as to which certiorari had been granted by the Supreme Court in 350 U. S. 907.

Dkt. 266—*Home Utilities Company, Inc.* v. *Eastman Kodak Company* (4th Circuit), July 19, 1956, Petition filed. October 8, 1956, Petition granted, case transferred to summary calendar awaiting oral argument.

The questions presented are (1) the construction and meaning of the words "free and open competition" in the McGuire Act and (2) can a seller fair trade a packaged unit when some of the component parts are sold individually on a non-fair traded basis.

Dkt. 303—*Grengs* v. *Twentieth Century Fox Film Corporation* (7th Circuit), August 8, 1956, Petition filed and awaiting action.

The question presented is the applicability of the Wisconsin two year Statute of Limitations to petitioners action under the federal antitrust laws.

Dkt. 355—*Melrose Realty Co. Inc.* v. *Loew's Inc.* (3rd Circuit), Petition filed August 29, 1956, now awaiting action.

This case presents the question of whether a non-operating lessor-owner of a theatre whose rental income is based upon theatre receipt is a "person" entitled to bring a private antitrust suit under §4 of the Clayton Act.

Dkt. 437—*Carl Drath, t/a Broadway Gift Co.* v. *Federal Trade Commission* (D. C. Circuit), Petition filed September 21, 1956, now awaiting action.

The question presented is whether a Court of Appeals can issue an order enjoining a party seeking review of a commission cease and desist order from conducting the business against which said order to cease and desist was issued, pending the outcome of his petition for review.

Dkt. 452—*Joseph Sachs, d/b/a Atlantic Liquor, et al.* v. *Brown-Forman Distillers Corp.* (2nd Circuit), Petition filed September 25, 1956 now awaiting action.

This case presents certain questions of law arising under the Robinson-Patman Act in respect to "price discrimination" and "justification."

Dkt. 465–*Federal Trade Commission* v. *Standard Oil Co.* (7th Circuit), Petition filed September 28, 1956, now awaiting action.

Under Section 2 (b) of the Robinson-Patman Act, a seller may defend against a charge of price discrimination by showing that his lower price was granted in "good faith" to meet the equally low price of a competitor. The question presented is whether the "good faith" defense can be used to justify a lower price regularly granted to certain large customers pursuant to a long established pricing policy maintained by the seller and by certain competitors.

Dkt. 480–*Gulf Coast Shrimpers and Oysterman, et al.* v. *United States* (5th Circuit), Petition filed October 5, 1956, now awaiting action.

Other Federal Courts

United States v. *Northern Pacific Railway, et al.* (D. C. W. D. Wash., June 3, 1956). The government's motion for summary judgment was granted in part.

The complaint alleges that certain clauses contained in deeds and leases granted by the defendants are in violation of Section 1 of the Sherman Act. These provisions are termed "traffic clauses."

The defendant, Northwestern Improvement Co., is engaged in the business of selling and leasing land owned by the Northern Pacific Railway. The traffic clauses require the grantee or lessee to ship via Northern Pacific Railway all commodities produced by/or on land sold or leased, provided neither a lower rate nor better service be available from a competing line. The complaint contends that these are tying arrangements which are illegal *per se* under Section 1 of the Sherman Act.

The Court held that market dominance over the product, *i.e.*, the land sold or leased by the railroad, was established and that the amount of commerce restrained in each category was not unsubstantial or inconsequential. All the traffic clauses were held violative of Section 1, excepting those in the industrial leases, which will require a trial as to remaining issues of fact.

United States v. *Logan Co., et al.* (D. C. W. D. Pa., June 7, 1956). The entry in the Federal District Court for the Western District of Pennsylvania of a consent decree was announced.

The defendant, Logan Co., a manufacturer of sheet chargers (a feed table and conveyor for use in rolling metal sheets) is required by the terms of the consent decree to license its patents for sheet chargers to any person if it issues a license under such patents. The decree prohibits the manufacturers from entering into agreements to fix prices, or to exchange cost or price information. Southland Tractors, Inc. and Farm Tractors, Inc. filed suit in federal court in Memphis charging Massey-Harris-Ferguson, Inc., U. S. farm machinery maker and its parent company, Massey-Harris-Ferguson, Ltd., biggest producer of farm machinery in the British Commonwealth, with unreasonable restraint of competition in interstate commerce. The president of the two suing firms stated that he organized these companies to distribute Ferguson tractors and other farm implements manufactured by the orginal Ferguson Company. The suit alleges that after the merger of Massey-Harris Company, Ltd., and Harry G. Ferguson, Ltd., the new merged company refused to furnish distributors of the Ferguson line with enough implements to stay in business, but gave its own branches duplicated Ferguson implements under the Massey-Harris name. Mr. C. T. Milne, Vice President and General Manager of Massey-Harris-Ferguson's U. S. subsidiary stated that the claims of the plaintiff are "wholly without foundation."

United States v. *Employing Plasterers Association of Chicago, et al.* (D. C. Ill., June 28, 1956).

The Government moved to dismiss the indictment against the Employing Plasterers Association of Chicago, et al., and the indictment and a companion civil case against the Employing Lathers Association of Chicago, et al.

The Federal District Court in Chicago ordered the dismissal of the two criminal cases upon the Government's motion of nolle prosequi. The Court also dismissed the civil case without prejudice to the Government on the filing of a stipulation between the Government and the defendants.

The defendants in these cases had been charged with conspiring to suppress competition among lathing and plastering contractors in

the Chicago area, and to restrict persons from engaging in those businesses.

Assistant Attorney General Stanley N. Barnes, head of the Anti-Trust Division, said: "The facts on which the *Plastering* case was based and the issues involved in the *Lathing* cases were substantially identical with those of the civil antitrust case against the Employing Plasters Association of Chicago et al. which was tried last year before Judge J. Sam Perry. Judge Perry decided the latter case in favor of the defendants. As the basic facts and legal theory under which the remaining cases would be tried are so similar to the facts and legal theory of the case which was tried and decided in favor of the defendants, we are dismissing the companion criminal *Plastering* case and the two related *Lathing* cases."

United States v. *National Linen Service Corp.* (D. C. Ga., June 28, 1956).

An antitrust consent judgment was entered against the National Linen Service Corporation, Atlanta, Georgia. At the same time, in a companion criminal case against the Corporation and three of its officers, the Court permitted defendants to change their pleas from not guilty to *nolo contendere* and imposed fines of $10,000 on National Linen Service Corporation and $4,000 on each of the three individual defendants named in the criminal case. These individual defendants, all in Atlanta, are: Milton N. Weinstein, A. J. Weinberg and J. B. Jacobs.

The complaint and indictment were filed April 25, 1955 and charged that National Linen Service Corporation violated Sections 1 and 2 of the Sherman Act by restraining and attempting to monopolize the linen service business in the south and by monopolization of the linen service business in the southeast.

The indictment and complaint alleged that National Linen Service Corporation entered into a series of contracts in unreasonable restraint of the linen supply business. It was alleged that National made unlawful acquisitions, restrained the entry of laundries into the linen supply business, entered into agreements with its competitors and its employees imposing upon them unreasonable restrictions on their freedom to engage in the linen service business and instituted litigation to enforce the various unlawful agreements. The complaint also alleged that National conducted price wars, subsidized low prices in

some areas by imposing higher prices in other areas where it had a dominant position in the market, furnished free and below cost services, discounts and rebates to discourage competition, trailed trucks of competitors in order to induce customers of competitors to transfer their patronage to National, and induced or compelled competitors in selected areas to enter into agreements eliminating competition.

The judgment entered prohibits National from engaging in the various tactics alleged in the complaint. In addition, National is ordered to divest itself of all its interests in the Tulsa Linen Service Company and the Atlanta Laundries, Inc. Subject only to a voting trust, National is also ordered to divest itself of all interest in Consolidated Laundries Corporation in New York City. Finally, the judgment directs National to divest itself, within one year from the date of entry of the judgment, of the following linen service branches owned by it:

(a) either the branch at Orlando or the branch at Daytona Beach, Florida;

(b) either the branch at Macon or the branch at Albany, Georgia; and

(c) either the branch at Winston-Salem or the branch at Raleigh, North Carolina.

In addition, National must sell trade routes amounting to annual linen service sales of at least $68,000 serving Dalton, Ringgold and Lafayette in Georgia, or serving Cleveland, Tennessee. Trade routes amounting to annual linen service sales of at least $60,000 serving Danville and Chatham or $80,000 serving Lynchburg—all in Virginia—are also ordered to be sold.

United States v. *National Electrical Contractors Association, el al.* (D. C. N. J., July 13, 1956).

The entry in the Federal District Court in New Jersey, of an antitrust complaint and consent decree was announced.

The complaint charged the defendants with engaging in an unlawful combination and conspiracy to suppress and eliminate competition in the sale and installation of electrical equipment in violation of Section 1 of the Sherman Act.

The complaint alleges that the conspiracy consisted of agreements to allocate the sale and installation of electrical equipment and to have a geographical division of territory among the defendants in New Jersey.

The defendants, by the terms of the consent decree, are enjoined from fixing prices or exchanging information as to bid prices for the sale or installation of electrical equipment. They are also prohibited from allocating contracts or restricting their work to a prescribed area, or obtaining bidding information from awarding authorities requesting bids. The defendants are further restrained from entering into any agreement with labor unions to restrict the labor supply or to discriminate in supplying labor to electrical contractors who abide by union requirements as to wages, hours and working conditions.

United States v. *Philco Corporation* (D. C. E. D. Pa., July 13, 1956).

An antitrust consent judgment was entered successfully terminating restraints of trade in the sale of Philco products.

The Government's complaint, which was filed on December 15, 1954, charged the Philco Corporation of Philadelphia, Pa. with violations of Section 1 of the Sherman Antitrust Act and Section 3 of the Clayton Act.

The complaint, in charging a Section 1 violation, alleged that Philco Corporation sold Philco products (which include radios, phonographs, television sets, refrigerators, freezers, air conditioners and electric ranges) to wholesale distributors under contracts whereby the wholesale distributors agreed not to sell or ship such products to retail dealers located outside of the specific sales territory allotted to each wholesale distributor by Philco. These contracts also gave Philco the right to purchase for the account of a distributor, any Philco products sold by that distributor outside his allotted territory.

The retail dealers in Philco products, it was charged, were required to agree to sell such products to consumers only, and could not sell such products to other retail dealers. It was also alleged that the effect of these restrictions was to eliminate competition in the sale of Philco products at both the wholesale and retail level, by preventing retail dealers in Philco products from selling such products to other retail dealers, and by preventing retail dealers, not approved by Philco

and the Philco wholesale distributor for their territory, from acquiring Philco products for resale.

The complaint, in charging a violation of Section 3 of the Clayton Act, alleged that Philco sold its complete line of products to wholesale distributors upon the condition that the wholesale distributors would not deal in any products which were competitive with Philco products.

The judgment entered today enjoins Philco from entering into any contracts with any wholesale distributor or retail dealer which (1) give Philco the right to purchase any Philco products for the account of such distributor or dealer except at his request; (2) prevent such distributor or dealer from selling or otherwise dealing in products not manufactured by Philco, or (3) limit or restrict the persons to whom or the territory within which any distributor or dealer may choose to sell Philco products. Philco is further enjoined from conditioning the filling of any order placed by any established Philco wholesale distributor upon the agreement or understanding that such distributor will purchase any other Philco product.

Subject to its terms, the judgment reserves the right to Philco to choose and select its distributors and customers; to designate geographical areas in which its distributors shall be primarily responsible for wholesaling Philco products, and to terminate the franchises of distributors who do not adequately represent Philco and promote the sale of Philco products in areas designated as their primary responsibility.

United States v. *International Cigar Machinery Co., et al.* (D. C. S. D. N. Y., July 25, 1956).

The entry in the Federal District Court in the Southern District, in New York City, of a consent decree was announced.

The defendant, International Cigar Machinery Company is a distributor owned and controlled by the defendant American Machine and Foundry Co. which is the only manufacturer of cigar making machinery in the United States.

The defendants are required by the consent decree to license their patents for cigar making machinery on a nonexclusive basis to any applicant with a provision for a nondiscriminatory reasonable royalty rate.

Department of Justice Activity

Attorney General Brownell announced that actions charging price-fixing highlighted the enforcement of the antitrust laws during the first six months of 1956

The Attorney General referred to a report made by Judge Stanley N. Barnes on the activities of the Antitrust Division since January 1, 1956. The report was Judge Barnes's final official act as Assistant Attorney General in charge of the Antitrust Division, before being sworn in as a judge of the Court of Appeals for the Ninth Circuit on July 3, 1956. It stated:

"Among criminal actions filed in the first six months of this year were cases involving charges that two major oil companies, Shell Oil Company and Socony Mobil Oil Company, Inc., have each entered into illegal price-fixing agreements with independent service station operators. It was alleged that, these agreements, the filling station operators gave up their right, as independent businessmen, to determine their own prices and agreed to post prices pre-arranged with the oil company.

"One of these cases is against an official of Socony Mobil Oil Co. This is the first case the Division has brought under Section 14 of the Clayton Act which makes a criminal offense an act by a corporate officer or agent which constitutes in whole or in part a violation by the corporation of any penal provision of the antitrust laws.

"In another of these cases, the defendant Shell has already been sentenced to pay a fine of $5,000, the maximum permissible under the Sherman Act. While the maximum penalty has just recently been increased to $50,000, this defendant's action occurred at a time when the highest fine was $5,000.

"The Antitrust Division has filed 29 antitrust cases since January 1, 1956. Thirteen of these are civil actions and 16 are criminal.

"One monopoly case filed charges, among other things, the monopolization of thermostatic temperature controls used to regulate heat in gas cooking ranges. The defendants in this case are charged with agreeing to pool patents to acquire and maintain a dominant industry position, and with agreeing to restrict the licensing of these patents. The Division is seeking to secure injunctive orders which will free this line of commerce from such restraints.

"Two cases filed this year involve alleged practices which impair the operation of the government's cotton disposal program. A part of the cotton acquired through the price support program is offered for sale generally on a competitive bid basis in which the bidder submits sealed bids. A group of cotton merchants was indicted on the charge that they had used a common purchasing agent who was permitted to fix the prices bid by them and allocate among them lots of cotton offered for sale by the government. A companion civil action was filed to enjoin such restrictive practices.

"The Antitrust Division has continued its vigilant investigation of current mergers. A sixth important merger action was filed and consent judgments were secured in two other merger actions. These judgments against the Hilton Hotels Corporation and the General Shoe Corporation will prevent these defendants from making future acquisitions which may substantially lessen competition or tend to create monopoly and they also require divestiture of certain of defendants' holdings.

"Other cases filed this year include an action against several large rubber companies on the charge that they agreed to fix prices on rubber belts used in power transmission units in the textile, railroad, oil and machinery and other industries, as well as on home appliances.

"Many of the cases filed charged such well-recognized violations as price-fixing, boycotting and customer and territorial allocation. One such case charged the International Boxing Guild with conspiring with various of its affiliated local guilds to boycott nonmember managers of boxers, and promoters disapproved by the International or its affiliates. The indictment charged that the conspirators also boycotted professional boxing shows promoted for television audiences, known as 'studio boxing shows.'

"Thirty-six cases have been terminated in the six-month period ending June 30, 1956. This represents an increase of more than 71 percent over the number of cases closed in the corresponding period last year, in which 21 cases were closed. Of the 36 cases closed this year, 24 were civil and 12 criminal.

"The Division closed 12 civil antitrust cases by negotiated consent judgments. Two of the most important of these related to cases charging monopolization of commerce in telephone equipment and of the tabulating industry. Both judgments contain extensive com-

pulsory patent licensing provisions and divestiture provisions designed to establish freedom in which competition may develop.

"An important matter involving the participation of a labor union in a trade restraint was settled by consent judgment this spring. In this case, the union owned and managed a corporation engaged in the business of selling supplies for ships' stores. The union was charged in this action with using its power as a labor organization to compel vessel owners to obtain these supplies, known as 'slop chest' supplies, from the union's corporation and to compel ship owners to refuse to purchase such supplies from other dealers. A district court had held that these particular activities were not immunized from the antitrust laws by the Norris LaGuardia and Clayton Acts labor union exemption. Among other things, the judgment requires cancellation of provisions in collective bargaining contracts requiring vessel owners to purchase slop chest supplies from only the corporation.

"Other significant cases settled by consent judgments involved restraints on newspaper and periodical advertising, gear cutting and finishing machines and tools, booking and presentation of legitimate theater attractions, milk, linen supply and books.

"Nine criminal cases were terminated by entry of pleas of *nolo contendere* by the defendants. The Division has consistently opposed entry of such pleas. In some instances where '*nolo*' pleas have been accepted, the courts have indicated that defendants will not thereby be permitted to avoid or lighten the penalty for antitrust violations. In one case the court imposed suspended jail sentences against seven individual defendants and in several instances fined defendants the maximum amount permitted by the Sherman Act.

"Two major decisions were handed down by the Supreme Court. These were in the McKesson & Robbins case and in the duPont cellophane case. The first one is an important victory for the government and the second one a loss. The McKesson decision held that the 'fair trade' exemption from the Sherman Act, given to certain limited price-fixing agreements, does not include price-fixing agreements with independent wholesalers when made by a manufacturer who competes with them in selling its own products at wholesale.

"In its decision in the duPont case that commerce in cellophane has not been monopolized, the Supreme Court adopted a theory of 'the relevant market' which may require litigation before its meaning is clear. The Court recognized that cellophane is a part of commerce

capable of being monopolized but ruled that 'cross-elasticity' of consumer demand for other products must be considered to determine the existence and effect of competition on that part of commerce alleged to have been monopolized."

The report noted finally that 99 Government antitrust cases are presently pending on the dockets of the federal courts.

Attorney General Brownell further commented:

"Pursuant to new duties assigned by the 84th Congress, the Antitrust Division has prepared several reports to the President and Congress on special aspects of competitive enterprise. Two reports, as well as one supplemental report, have dealt with the economic effects of certain activities under the Defense Production Act; one report has been made on the competitive effects of the disposal of government-owned synthetic rubber producing facilities and one report has been made under the Small Business Act concerning problems of small business."

United States v. *Haverhill Fuel Oil Dealers' Association, et al.* (D. C. Mass., June 27, 1956).

A civil antitrust suit was filed against a fuel oil dealers' association and several bulk plant fuel oil dealers, charging them with combination and conspiracy to fix and maintain fuel oil prices in violation of Section 1 of the Sherman Act.

The complaint asks that the Court issue appropriate injunctive relief prohibiting the defendants from continuing these practices.

United States v. *Socony Mobil Oil Co., Inc.* (D. C. Mass., June 28, 1956).

A Federal Grand Jury, sitting at Boston, Massachusetts, has returned six antitrust indictments charging price fixing in the retail sale of gasoline. Socony Mobil Oil Company, Inc., is named as the sole defendant in five of the indictments, which contain a total of 22 counts. The sixth indictment charges R. Reginald Potts, Socony's New England Divisional Manager, with authorizing acts in connection with some of Socony's alleged violations, and is brought under Section 14 of the Clayton Act.

The Socony indictments charge that the company entered into oral contracts with gasoline service station operators, who are independent businessmen, fixing the retail prices at which the operators

sold gasoline at retail. The service stations involved are located in and near Boston, Massachusetts.

According to the indictments, at various times since 1953 Socony has entered into agreements with a number of its service station operators setting the retail prices at which they would resell gasoline to motorists. In return, Socony is alleged to have granted wholesale price concessions, rebates, and service station rental deductions to the dealers in question. In one of the counts, Socony is charged with renewing a service station lease on the condition that the lessees abandon their retail pricing policy for one established by Socony.

The indictments assert that the oral contracts had the effect of enabling Socony to tamper with the prices at which small local retailers sold gasoline, and of facilitating Socony in maintaining its posted tankwagon prices at high, arbitrary and non-competitive levels.

United States v. *Erie County Malt Beverage Distributors Association, et al.* (D. C. W. D. Pa., June 29, 1956).

A civil antitrust suit was filed against malt beverage purchasers and importing distributors and associations located in Pennsylvania, charging them with violations of Section 1 of the Sherman Act.

The complaint states that the defendants have engaged in a conspiracy to suppress and eliminate competition in the sale of malt beverages to home consumers in Erie, Pa.

The combination and conspiracy allegedly consists of fixing prices of malt beverages and fixing delivery charges and markups thereon, and maintaining uniform closing hours. The complaint states that this has resulted in high artificial prices of case lots of malt beverages in Erie County. The defendants have used coercion and threatened boycotts, and have prevented distributors and importing distributors not participating in the combination and conspiracy from purchasing supplies of malt beverages and selling them in Erie County.

The complaint requests appropriate injunctive relief.

United States v. *Operative Plasterer's & Cement Masons International Ass'n of the U. S. and Canada, et al.* (D. C. Ill., June 29, 1956).

A civil antitrust complaint was filed in the Federal District Court at Chicago, charging two labor unions (Operative Plasterers and Cement Masons International Association of the United States and Canada and Bricklayers, Masons and Plasterers International Union

of America) and E-Z-ON Corporation, Chicago, Illinois, a manufacturer of plastering machines, with combining and conspiring in unreasonable restraints of interstate trade.

According to the Government's complaint, the defendants agreed that within the United States and Canada E-Z-ON plastering machines will not be distributed on an outright sales basis but will be leased only. It is also alleged that the defendants agreed that within the territorial jurisdiction of the defendant unions such machines will be leased to union contractors only, and that E-Z-ON Corporation will prohibit its lessees in the United States and Canada from assigning or subleasing such machines to others. The complaint further alleges that the defendants entered into written contracts embodying those restrictions.

In commenting upon this complaint, Mr. Brownell stated:

> "Plastering machines are alleged to save time and costs in building. The distribution of such machines should not be fettered by illegal restrictions. The agreements alleged in this complaint have nothing to do with labor relations between E-Z-ON Corporation and unions. Those alleged agreements simply prohibit sales of the machines in question and provide that those machines be leased on a restrictive basis. According to the complaint Contractors who are eligible under the terms of the alleged conspiracy to lease such machines obtain an undue competitive advantage over other contractors. If proven, such restrictions run afoul of the Sherman Act."

Assistant Attorney General Stanley N. Barnes, Head of the Antitrust Division, further explained:

> "Agreements and conspiracies providing for restrictions such as are alleged in this complaint violate the antitrust statutes. The complaint, therefore, seeks to compel E-Z-ON Corporation to sell its plastering machines outright, instead of merely leasing them to a particular group of contractors."

United States v. *General Motors Corp.* (D. C. Mich., July 6, 1956).

A civil antitrust complaint was filed in the Federal District Court at Detroit, Michigan, charging General Motors Corporation with

monopolizing the manufacture and sale of transit and intercity buses and with conspiring with four bus operating companies to monopolize the manufacture and sale of buses.

Named as co-conspirators, but not as defendants, are the Hertz Corporation, the Greyhound Corporation, National City Lines, Inc., and Public Service Coordinated Transport Co.

The complaint charges that General Motors Corporation has manufactured at least 65 percent of the new buses delivered in the United States during each year from 1952 to 1955, inclusive, and that in 1955 it accounted for approximately 85 percent of the sales of new buses in the United States. In that year, it is alleged, General Motors' bus sales amounted to approximately $55,000,000. The complaint also alleges that between 1925 and 1955 more than 20 manufacturers of buses have withdrawn from the bus manufacturing business and that no new company has entered the field since 1946.

According to the complaint, General Motors obtained its alleged monopoly by requiring other manufacturers to discontinue or curtail the manufacture of buses; by having a General Motors' officer and director serve as chairman of the board of a principal competitor; by acquiring the power to control bus operating companies and by entering into requirements contracts with some of them; by agreeing to refuse to sell buses to competitors of favored customers; by extending to favored customers preferential prices for buses and bus parts; by making loans of money to bus operating companies; by using its financing subsidiary, Yellow Manufacturing Acceptance Corporation, to extend preferential financing terms which competitors could not meet; by inducing officials of municipally-owned transit companies to issue restrictive bus specifications excluding other manufacturers from bidding; by refusing to sell various bus parts, including diesel engines and automatic transmissions to competitors; and by acquiring exclusive rights to use various improvements.

The complaint asks that General Motors be enjoined from selling more than 50 percent of the annual bus requirements of the co-conspirators named in the complaint and their successors. The relief sought also includes the termination of restrictive agreements and injunctions against their revival. The complaint also seeks specific relief with respect to the patents and patent rights allegedly abused by the defendant and asks that General Motors be required to sell to competitive manufacturers various bus parts and to extend to other

manufacturers the financing facilities of Yellow Manufacturing Acceptance Corporation.

United States v. *Philadelphia Radio & Television Broadcasters Association, et al.* (D. C. E. D. Pa., Aug. 3, 1956).

A civil antitrust suit was filed, charging the Philadelphia Radio & Television Broadcasters Association and nine radio broadcasting stations with agreeing to maintain rates for sale of radio broadcasting time in Philadelphia in violation of Section 1 of the Sherman Act.

In addition to the Association, the defendants are: Independence Broadcasting Company, Max M. Leon, Inc., Pennsylvania Broadcasting Company, Seaboard Radio Broadcasting Corporation, Triangle Publications, Inc., WCAU Incorporated, WJMJ Broadcasting Corporation, Wm. Penn Broadcasting Company, L. M. C. Smith, doing business as Franklin Broadcasting Co., all of Philadelphia. Named as a co-conspirator but not as a defendant is Westinghouse Broadcasting Company, Inc., which operated Radio Station KYW in Philadelphia until January 1956, when it was sold to the National Broadcasting Company.

The complaint alleges that the defendants since 1952 have been parties to an agreement to maintain and refrain from deviating from published advertising rates for sale of radio broadcasting time in Philadelphia established by each of the defendant broadcasting concerns.

The relief sought in the complaint includes the termination of the restrictive agreements and injunctions against their revival. The complaint also seeks to cancel any by-law, policy, or code adopted by the defendant Association requiring its members to maintain and not deviate from advertising rates for the sale of radio broadcasting time. Finally, the Court is requested to order the defendant Association to adopt and enforce by-laws in conformity with the provisions of the judgment and to make membership in the Association contingent upon compliance with the provisions of the judgment.

In commenting on the filing of this suit, Assistant Attorney General Victor R. Hansen of the Antitrust Division said:

> "This civil action is the companion case to a pending criminal prosecution involving substantially the same parties and subject matter. By this action, the Government requests injunctive relief which will restore freedom of action to each of the radio

broadcasting concerns involved and insure to purchasers of radio broadcasting time the benefits of free and open competition."

United States v. *Continental Can Co.* (D. C. N. D. Calif., Aug. 2, 1956).

The Federal District Court in San Francisco issued an order requiring Continental Can Co. Inc. to show cause why it should not be temporarily enjoined from going through with its proposed merger with Hazel-Atlas Corporation.

The Government had requested the court to stop the merger until the court could determine whether the proposed merger is prohibited by a 1950 antitrust judgment against Continental.

The 1950 judgment prohibits Continental from acquiring the assets of any company engaged in the manufacture of "containers" except after an affirmative showing to the Court that the effect of such acquisition may not be substantially to lessen competition. At the time when the Government obtained the order to show cause it filed a motion requesting the court to construe the term "container" as used in the judgment to include glass containers.

The Government's motion and supporting affidavit alleged that Hazel-Atlas is the second largest manufacturer of glass containers and that the effect of the merger, if consummated, will be to increase Continental's total sales from approximately $666,266,408 to $746,186,203; to increase Continental's total assets from $381,917,101 to $419,801,526; to increase the number of manufacturing plants of Continental in the United States from 77 to 90; to eliminate permanently all competition heretofore existing between Continental Can and Hazel-Atlas; and to give Continental such a decided competitive advantage in the manufacture for sale of glass and metal containers as may substantially lessen competition in the United States in their sale and distribution.

Federal Trade Commission Activity

FTC v. *Henry Rosenfeld, Inc.* (FTC Dkt. 6212, Order, June 29, 1956).

The Commission ordered Henry Rosenfeld, Inc., a prominent New York City merchandiser of women's clothes, to stop discriminating among retailer customers in the granting of promotional allowances.

Noting that the practice is apparently "widespread in the industry," the Commission, in an opinion by Commissioner Robert T. Secrest, found in effect that Rosenfeld has granted allowances among competing retailers on shifting and unpublicized bases.

This, the Commission said, violates Sec. 2(d) of the Robinson-Patman Amendment to the Clayton Act, which requires that allowances, if offered, must be made available to all competing customers on "proportionally equal terms."

Affirming an initial decision by Hearing Examiner Frank Hier, the Commission denied a request by the company to suspend decision of the case pending the institution of a Commission Trade Practice Conference for the industry.

Trade practice rules, Commissioner Secrest said, are advisory interpretations not having the "force and effect of law." Assuming rules for this industry were ultimately promulgated, he added, the company would be under no "legal injunction" to stop the unfair practices in which it is engaging.

Involved in today's action are women's dresses, ranging in wholesale price from $5.75 to $10.75, and sold by the company primarily it its showroom in New York City. The company, when it participates, pays 50% of the retailer's local advertising costs up to $1.00 per garment. Generally allowances are limited to dresses making large profits for the company, to slow sellers, and to those made from left-over or excess piece goods.

However, Commissioner Secrest said, the terms vary constantly from garment to garment and from time to time "solely at the discretion of [the president] Henry Rosenfeld . . . [T]hey could scarcely be regarded as terms at all."

Another defect in the company's promotional allowance activity, the Commissioner continued, is its failure to inform all customers of the terms of allowances.

Noting that the allowances were "aggressive rather than defensive merchandising weapons" and that respondents were meeting competition generally rather than specifically, Commissioner Secrest stated that the hearing examiner had correctly held that respondents had failed to make out a defense of meeting competition in good faith through their practices. He held that the good faith defense provided for in 2(b), is not, however, available to respondents in this proceed-

ing which involves only violation of Section 2(d) of the amended Clayton Act.

Faced with the "exiguous legislative history" on the applicability of the defense, Commissioner Secrest observed that "we are forced to the 'bare-bones' language of the statute" which limits the defense to discriminations in price "or the furnishing of services or facilities." The Commissioner concluded that advertising allowances are not within the ambit of the statutory language; hence, Section 2(b) cannot constitute a substantive defense to a proceeding charging only violation of Section 2(d).

The Commission's order prohibits the company and Henry Rosenfeld from giving any promotional payment to any customer "unless such payment is affirmatively offered or otherwise made available to all competing customers in amounts determined by the same percentage of the same measurable base."

FTC v. *Fruitvale Canning Co.* (FTC Dkt. 5989, July 2, 1956).

The Commission, in an opinion delivered by Commissioner William C. Kern, ordered Fruitvale Canning Co., Oakland, Calif., to stop favoring large retail chain food stores and wholesalers with price cuts on canned fruits.

In this highly competitive industry a price advantage over competitors of 5 to 10 cents per dozen cans is sufficient to divert business from one grocer to another and is "of a type and character identical to those we conceive the Robinson-Patman Act was enacted to curb," Commissioner Kern said.

"Indeed, as we view it," he continued, "the main thrust of the Robinson-Patman Act was to curb the predatory use of monopoly power by chain stores and mass buyers and to preserve the place of small business as well as to protect its competitive position."

The Commission adopted the decision and cease and desist order of Hearing Examiner Abner E. Lipscomb, issued November 4, 1955, and denied an appeal by Fruitvale from that decision.

Commissioner Kern said that Fruitvale grants a price advantage to its favored buyers "as a customary and normal method of business." The differential is not justified, he added, by any decrease in sale costs, by any attempt to meet lower prices of competitors, or by any changing market conditions.

The practice of this company, Commissioner Kern said, parallels the practices uncovered by the Commission in its Chain Store Investigation of 1934 which, along with similar harmful competitive practices, provided "the major impetus" for passage of the Robinson-Patman Act.

Fruitvale, though comparatively small, is a substantial factor in the fruit-canning industry and packs primarily under private labels. The favored customers, who maintain direct buying agencies in San Francisco, are, among others, Safeway Stores, Inc., The Great Atlantic & Pacific Tea Company, the Kroger Company, The American Stores Company, First National Stores, National Retailer Owned Grocers. Inc., Consolidated Grocery Company, and Topco Associates, Inc.

The Commission's order prohibits Fruitvale from selling at different net prices to competitors or favoring a retailer over a wholesaler whose customers compete with the favored retailer.

FTC v. *Alaska Packers Association, et al.* (FTC Dkt. 6376, Init. Decision, July 3, 1956).

Fixing of salmon prices in the Puget Sound area by the area fishermen's union and vessel owners' association would be prohibited, according to an initial decision issued by a hearing examiner.

This is not a final decision of the Commission and may be appealed, stayed, or docketed for review.

Involved in the examiner's order are Local No. 3, Fishermen & Allied Workers Division, International Longshoremen & Warehousemen's Union, Seattle, Wash., and the Purse Seine Vessel Owners Association, Tacoma, Wash.

The examiner, William L. Pack, found that the two groups have made restrictive agreements which, along with minimum price-fixing contracts negotiated between the union and the area salmon canners, "substantially" restrain competition in the industry with a tendency to enhance the price the public may pay for canned salmon.

The Canners, also named in the Commission's complaint charging the conspiracy, have accepted a consent order prohibiting price-fixing activity.

The Pudget Sound salmon area extends from the Canadian Border and Cape Flattery 150 miles south to Seattle and Tacoma. Salmon is one of the most important industries in that part of the U. S., where in 1954 the wholesale value of the salmon pack was $12 million.

"Purse Seine" vessels, so named because the seines used resemble purses, account for approximately 75% of the salmon catch in the area.

Industry members are the canners who buy the raw fish and process it, the vessel owners or skippers who do the actual fishing, and their crew members, who are usually union members.

The two agreements which the examiner found are illegal are the "Salmon Agreement" between the union and the canners and the "Working Agreement" between the union and the vessel owners.

The Salmon Agreement, whether executed with the union by only one or all of the canners, has the practical effect of fixing minimum prices paid by all to the vessel owners, the examiner said.

Tied to this agreement, the examiner continued, is the Working Agreement, providing in part that no boat is allowed to leave for the fishing grounds or be moved from its home port until the price agreements have been signed. "Any vessel violating this section," the Working Agreement provides, "shall be declared unfair."

The provision is enforced by the union, which publicly denounces any violators as "Scabs," the examiner stated. Picket lines are thrown around the plant of any canner purchasing fish from the violating vessel, and cannery workers, members of the union, refuse to cross this picket line.

"An unusual feature" of these agreements, the examiner added, is that the vessel owners do not participate in determining the prices they will be paid for salmon. On occasion they have sought to participate in the negotiations, he noted, but have been prohibited by the union from doing so.

The agreements, the examiner ruled, "unquestionably [have] the effect of substantially restraining competition in the . . . industry . . . There is no competition whatever insofar as the minimum prices are concerned."

The union, as its principal defense to the charges, had maintained that the crew members on the vessels are, in fact, employees of the canners and that agreements between them are nothing more than employer-employee wage agreements. The vessel owners and skippers, the union had said, are agents of the canners.

The testimony on this point is to the contrary, the examiner stated, and the union itself expressly recognizes the employer-employee re-

lationship between skipper and crew in its working and price agreements.

Actual fishing operations, the examiner continued, are under the control of the skipper. He employs his own crews and decides when and where the boat will fish. The skipper's control of operations, the examiner added, is not affected where the canner may own or hold a mortgage on the boat or may make postseason bonus payments to the skipper.

The Commission's complaint, filed June 28, 1955, had named as parties the union, the vessel owners' association, the Pudget Sound Salmon Canners, Inc. (the canners' association), and fourteen canners.

Prior to 1947, the examiner continued, the canners' association had negotiated price agreements with the union. Concerned as to the legality of the agreements, the association sought in 1947 to obtain "clearance" from the Justice Department, the examiner noted. The Justice Department did not give this clearance, and the association discontinued negotiating the agreements.

In view of this good faith disassociation eight years prior to the complaint, the examiner ruled, the association should be dismissed from the complaint.

The order against the union and the vessel owners prohibits the following activities:

> Entering into "Working Agreements" or "Salmon Agreements" or any others designed to fix the prices of raw or fresh salmon;
>
> Interfering with the operation of any fishing vessel with the purpose of maintaining any price-fixing agreement.

The order does not prevent any member of the vessel owners' association "acting individually" from negotiating with canners concerning salmon prices. The order also does not prevent: any collective bargaining between the union and employers concerning wages, hours, and working conditions of union members; or any association of fishermen from acting in accordance with the Fisheries Cooperative Marketing Act.

FTC v. *Outboard, Marine & Manufacturing Co.* (FTC Dkt. 5882, Order, July 6, 1956).

The Commission ordered the Outboard, Marine & Manufacturing Co., Waukegan, Ill., producer of the "Johnson Sea Horse," "Evinrude," and "Buccaneer" outboard motors, to discontinue exclusive dealing in the sale of these products.

The Commission adopted a hearing examiner's earlier ruling that the company's requirement that its market outlets sell no competing products violates Sec. 3 of the Clayton Act.

In a brief *per curiam* opinion the Commission said: "The trial record fully supports a conclusion of probable injury to competition through the foreclosure of competitors from a substantial and highly desirable portion of the outboard motor market."

The examiner, Frank Hier, had ruled in his initial decision that the company exacted assurances from purchasers that they would deal exclusively with Johnson, depriving them of their freedom to deal in competitive products.

Further, the examiner had said, the company's competitors and their distributors "have been foreclosed from a substantial segment of the best marketing outlets, have been relegated to creating, training and developing inexperienced potential outlets and have thus been hampered and restrained in marketing their products."

Outboard's market share was found to be "dominant" at times and "never less than substantial," with its outlets accounting for "more than a substantial segment of the total outlets."

The Commission's order prohibits the company from making exclusive dealing agreements and "enforcing or continuing in operation or effect" any such agreements.

FTC v. *Jos. Martinson, et al.* (FTC Dkt. 6469, Consent Order, July 9, 1956).

The Commission announced approval of a consent order prohibiting Jos. Martinson & Co., Inc., a New York City packager of coffee and teas, from granting promotional allowances to customers except on a "proportionally equal basis."

Proportionally equal treatment of customers is a requirement of Sec. 2(d) of the Robinson-Patman Amendment to the Clayton Act. Martinson was one of 11 food suppliers charged November 21, 1955, with violating this law.

Today's action represents the Commission's adoption of an initial decision by Hearing Examiner Frank Hier approving an order agreed to by the company and the Commission's Bureau of Litigation.

In the complaint Martinson was charged with giving Food Fair Stores, Inc., special allowances for promotion of anniversary sales. Food Fair, as well as Giant Food Shopping Center, Inc., was charged with law violations, along with the suppliers, in November. The complaint against these two chains alleged they have induced special allowances from the suppliers which they "knew or should have known" were not being offered to their competitors.

The complaints against the chains and nine of the suppliers are still in litigation. Another supplier, Tetley Tea Co., agreed to an order similar to the one issued.

The order requires that if Martinson grants a promotional allowance to one customer, it must offer affirmatively, or otherwise make available, allowances "to all competing customers on proportionally equal terms."

The agreement is for settlement purposes only and does not constitute an admission by the company that it has violated the law.

FTC v. *H. J. Heinz Co., et al.* (FTC Dkt. 5994, Order, July 13, 1956).

The Commission issued an order prohibiting eleven canners of tomato products from joining in an illegal boycott of Cannery Growers, Inc., Maumee, Ohio, a co-op representing tomato producers in the Ohio area.

The companies are: H. J. Heinz Co., Pittsburgh, Pa.; Campbell Soup Co., Camden, N. J., and its purchasing agent, Joseph Campbell Co.; Stokely Van-Camp, Inc., Indianapolis, Ind.; Bauer Cannery, Inc., Holgate, Ohio; Foster Canning, Inc., Napoleon, Ohio; Hirzel Canning Co., Toledo, Ohio; Hunt Foods of Ohio, Inc., Toledo, Ohio; Lake Erie Canning Co., of Sandusky, Sandusky, Ohio; J. Weller Co., Oak Harbor, Ohio; and Winorr Canning Co., Circleville, Ohio.

The Commission affirmed a hearing examiner's ruling that the companies had boycotted the Co-op in 1951 but reversed his decision that the discontinuance of the boycott that season renders a cease and desist order unnecessary.

In a 3-1 opinion delivered by Chairman John W. Gwynne, the Commission ruled that "the facts in this particular case do not warrant

a dismissal . . . No affidavits or statements [from respondents] appear in the record indicating a clear intention to refrain from the practices found to exist." In fact, the opinion continued, the respondents "have at all times insisted that their course of conduct did not violate the law."

The Commission sustained the examiner's dismissal of the original Commission complaint as to three companies: Hunt Foods, Inc., Gibsonburg Canning Co., Inc., and Sharp Canning Co.

Hunt Foods of Ohio, Inc., a subsidiary of Hunt Foods, Inc., is bound by the order, but the majority of the Commission found that there was insufficient evidence to hold Hunt Foods, Inc., the parent company, liable for the activities of its subsidiary.

Commissioner Sigurd Anderson dissented only from the dismissal of Hunt Foods, Inc. Commissioner William C. Kern did not participate in the opinion of the Commission.

Commissioner Anderson, in his minority opinion, states that Hunt Foods of Ohio, Inc., is a "mere agent or instrumentality or department" of Hunt Foods, Inc., and that the order should issue against Hunt Foods, Inc.

The Cannery Growers, Inc., was organized in the Ohio area (comprising parts of Ohio, Michigan, and Indiana) in December 1950 to act as the bargaining agent for the growers in negotiating tomato contracts between them and the canners. In the industry, canners commonly contract with the growers for their crop before it is planted each year. Prior to 1950 the growers had no opportunity to negotiate terms and prices but were on a "take it or leave it" basis. It was in order to combat this that the Co-op was organized.

The Commission found that, in reaction to the Co-op, the canners followed a planned common course of action of refusing to deal with it. This is shown by a series of meetings, telephone conversations, personal contacts, and correspondence among the canners. Through these methods the canners kept each other informed of their stand not to deal with the Co-op.

Turning to consideration of the responsibility of Hunt Foods, Inc., for the actions of its subsidiary, the majority stated that the record is not clear concerning the relationship of the two companies. Counsel supporting the complaint, the majority added, called as a witness the executive vice-president of Hunt Foods, Inc., who was also vice-president and director of the Ohio subsidiary, and had access to the files

of both corporations. "If there was a situation not disclosed by the record, it could easily have been discovered," the majority concludes.

Commissioner Anderson, however, maintained that the testimony of the executive vice-president and other evidence support an order against the parent Hunt Foods organization. "It is clear, when all of the [vice-president's] testimony is considered together, that the Ohio operation was merely one in an integrated whole and looked upon as local, or merely a phase of the whole of the Hunt company business."

The Commission's order prohibits the named companies from: (1) refusing to grant recognition of or to negotiate with the Co-op as a bargaining agent for its grower members or (2) refusing to purchase tomatoes from growers who are members of the Co-op.

The initial decision in this case, issued August 8, 1955, was by Hearing Examiner Everett F. Haycraft.

FTC v. *United Cigar-Whelan Stores Corp., et al.* (FTC Dkt. 6525, Consent Order, August 5, 1956).

The Commission took an additional step to prevent chain stores from receiving favored treatment from their suppliers in violation of the law.

The Commission directed United Cigar-Whelan Stores Corp., Brooklyn, N. Y., to stop "knowingly inducing or receiving" from suppliers promotional allowances which are not made available to its competitors. United-Whelan, with 1,350 retail stores, is one of the Nation's leading drug chains.

The order was agreed to by United-Whelan and the Commission's Bureau of Litigation under the Commission's consent settlement procedure. An initial decision by Hearing Examiner J. Earl Cox approving the settlement was made final by the Commission today.

Acceptance of the order by United-Whelan is for settlement purposes only and is not an admission that it has violated the law.

Equal treatment of customers is provided for by the Robinson-Patman Amendment to the Clayton Act. Sec. 2(d) of the law requires that if promotional allowances are given, they be made available to all competing customers on "proportionally equal terms."

The Commission, in a complaint issued March 6, had charged United-Whelan with inducing or receiving from suppliers special allowances in return for promotion of their products on its TV shows.

The complaint had alleged that United-Whelan "knew or should have known" that the allowances were not being offered by the suppliers to its competitors. Receiving allowances under these conditions, the complaint had charged, is an unfair method of competition in violation of Section 5 of the FTC Act.

Included in the action is Product Advertising Corp., United-Whelan's wholly-owned subsidiary and advertising agency.

The order is not be construed to prohibit Product Advertising Corp. from selling to others, including suppliers of United-Whelan, advertising time on TV or radio programs not sponsored by United-Whelan or not advertising its products.

FTC v. *The Elwell-Parker Electric Co., et al.* (FTC Dkts. 6329, 6330, 6340, 6347, 6350, Init. Decisions, August 6, 1956).

On motion from counsel supporting the complaints, Commission Hearing Examiner Frank Hier dismissed charges that five of the Nation's leading manufacturers of materials handling equipment have engaged in unlawful price discrimination.

These are not final decisions of the Commission and may be stayed or docketed for review by the Commission.

The five companies are:

The Elwell-Parker Electric Co., 4205 St. Clair Ave., Cleveland, Ohio (6329);

Hyster Co., P. O. Box 4318, Portland, Oreg. (6330);

Lewis-Shepard Co., 125 Walnut St., Watertown, Mass. (6340);

Clark Equipment Co., Buchanan, Mich. (6347);

Otis Elevator Co., 260 11th Ave., New York City (6350).

Involved in the complaints were charges that the practice of the companies in giving favored customers price cuts by means of varying discount and rebate systems has threatened to lessen competition in their industry in violation of Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act.

The examiner granted the motions to dismiss, citing the Commission counsel's statement that he would be unable to prove adverse effect on competition.

The counsel gave as the reason for his motions the Commission's opinion dismissing a similar complaint against Yale and Towne Manu-

facturing Co., one of the largest manufacturers of this equipment. Ruling that the adverse effect had not been proved, the Commission, in that case, said there are competitive factors in the industry other than price which control the purchase of materials handling equipment. Also, the Commission said, the evidence indicated that competitors of Yale and Towne who do not give discounts have established themselves with large volume buyers previously supplied by Yale and Towne.

Commission counsel stated his belief that in the five remaining cases "the evidence which he could produce . . . would [not] make any stronger case showing the relative importance of price as a controlling factor in inducing sales of these products, or make any better case showing effects on competition, than the evidence which was adduced in support of the complaint in the Yale and Towne matter."

"Materials handling equipment" refers here to a type of industrial truck used in factories, warehouses, and mill and railroad yards to move merchandise on the premises.

FTC v. *Minute Maid Corp.* (FTC Dkt. 6466, Consent Order, August 6, 1956).

The Commission announced approval of a consent order prohibiting Minute Maid Corporation, New York City, from granting promotional allowances to customers except on "proportionally equal terms."

Proportionally equal treatment of customers is a requirement of Sec. 2(d) of the Robinson-Patman Amendment to the Clayton Act. Minute Maid was one of 11 food suppliers charged November 21, 1955, with violating this law.

Today's action is the Commission's adoption of an initial decision by Hearing Examiner Frank Hier approving an order agreed to by the company and the Commission's Bureau of Litigation.

In the complaint Minute Maid was charged with giving Food Fair Stores, Inc., and Giant Food Shopping Center Inc., special allowances for promotion of anniversary sales. The two chains were charged with law violations, along with the 11 suppliers, in November. The complaints against the chains alleged they have induced special allowances from the suppliers which "they knew or should have known" were not being offered their competitors.

Today's order requires that if Minute Maid grants a promotional allowance to one customer, it must offer affirmatively, or otherwise make available, allowances "to all competing customers on proportionally equal terms."

The agreement is for settlement purposes only and does not constitute an admission by the company that it has violated the law.

FTC v. *Main Fish Co., Inc.* (FTC Dkt. 6386, Order, August 8, 1956).

The Commission dismissed for lack of proof charges that Main Fish Co., Inc., Pier 49, Seattle, Wash., pays illegal brokerage to one of its largest direct purchasers of fresh fish.

The Commission, in an opinion by Commissioner Robert T. Secrest, ruled that the evidence does not support charges that the price cuts which Main Fish Co., frequently gives the Pacific California Fish Co., a direct buyer, are equivalent to the commission paid brokers for handling sales to other customers. Sec. 2(c) of the Robinson-Patman Amendment to the Clayton Act makes it unlawful to pay brokerage "or any allowance or discount in lieu thereof" to customers buying for their own account.

Main Fish Co., purchases fresh fish in boatload quantities, fillets them, and sells them to retailers, restaurants, and wholesalers.

In his opinion, adopting the initial decision of Hearing Examiner J. Earl Cox, dated February 20, Commissioner Secrest declared:

> "In rejecting the contention that price concessions by respondent to its direct purchaser were payments in lieu of brokerage because others had to buy from respondent through brokers who collected a fee of 5%, we do not exclude the possibility of inferring the payment of brokerage monies or sums in lieu thereof from surrounding circumstances, even though the parties to the sales do not openly employ the terminology of brokers' dealings. We only hold that on the facts of this record such an inference does not appear warranted."

Commenting on the evidence, consisting mainly of recapitulations of day-to-day prices charged various customers, Commissioner Secrest noted that on several occasions all customers, including Pacific, paid the same prices and that on other occasions other customers paid lower prices than Pacific.

The price differences, the Commissioner continued, show "no discernible pattern" and do not "Adequately support determinations by us that the prices accorded Pacific reflected allowances in lieu of brokerage."

Commissioner Secrest noted also factors which have a "marked impact on the prices of fish." He stated that "either the arrival or absence of substantial quantities of fish in any of the West Coast primary markets may materially affect prices previously commanded for supplies on hand in other markets. Because so many factors normally influence the prices of this perishable commodity, its merchandising differs considerably from the sale of stable commodities."

FTC v. *Serutan Co.* (FTC Dkt. 6522, Order, August 8, 1956).

The Commission approved the dismissal of charges that Serutan Co., Newark, N. J., had violated the Robinson-Patman Act, after counsel for the respondent and counsel for the complaint joined in requesting dismissal.

Serutan Co. was charged in a complaint, issued March 5, with giving United Cigar-Whelan Stores Corp. special promotional allowances in connection with the sale of Serutan and RDX, a dieting aid, in violation of the "proportionally equal" treatment standard of the Robinson-Patman Amendment to the Clayton Act.

The dismissal, originally contained in an initial decision by Hearing Examiner J. Earl Cox, dated June 22, does not prejudice the Commission's right to issue a new complaint, if the facts warrant it.

The company served with the complaint, Hearing Examiner Cox said in his decision, is a "new" Serutan Company which was organized in March 1956, has never sold Serutan or RDX, and, therefore, could not be made subject to an order based upon the original complaint.

FTC v. *Wilson, N. C., Tobacco Board of Trade, Inc., et al.* (FTC Dkt. 6262, Order, September 6, 1956).

The Commission dismissed charges that the Wilson, N. C., Tobacco Board of Trade, Inc., and its 19 warehouse members have illegally restricted warehouse trade in the area, but ordered the removal of certain unreasonable restraints on newcomers to the market and independent speculators.

The Commission, in an opinion by Commissioner Lowell B. Mason, adopted the initial decision by a hearing examiner and denied cross

appeals from that decision by the respondents and counsel supporting the complaint. Commissioner William C. Kern did not participate in the decision of the Commission.

The Commission approved the finding that the power of the Board to allocate selling time to the various warehouses is legal under state law, and the present system of allocation each year based on the previous year's performance is not, as charged in the complaint, "per se" unreasonable or illegal.

This performance system, Commissioner Mason's opinion stated, "was decided upon to prevent economic waste and not to deter entry of newcomers on the Wilson market; . . . it is generative of competition in services rendered the farmer in handling his tobacco and getting the best price for him; and . . . 'has forced the warehousemen to get out and hustle for business—to contact farmers and sell them on bringing their tobacco to that particular warehouse.' "

The performance system, then, the opinion continued, cannot "be struck down as an unlawful restraint of trade except as to minor separable mechanical operations . . . "

Concerning these operations, the order of the Commission prohibits the respondents from: (1) computing warehouse sales of its members, for determining yearly performance, by pounds of tobacco sold rather than by the number of baskets sold, (2) discriminating against the independent speculator, and (3) basing the time allowed a new warehouse on the past performance of only one other warehouse in the area.

The Wilson tobacco market, with sales in 1953 of over 91 million pounds, is the leader in the sale of flue-cured tobacco and is part of a five-belt area stretching from northern Florida to central Virginia.

Flue-cured tobacco is a perishable item, and the amount that is sold in a day must be controlled. This is true because tobacco once sold at auction must be moved to redrying facilities, which can handle only 120 million pounds weekly. If sales in flue-cured tobacco exceed this limit, the tobacco deteriorates.

The necessary overall control is carried on by the Bright Belt Warehouse Association, the area trade organization which provides a code of ethics and pattern of performance for its warehouse members.

The Wilson market is allotted 10,000 baskets a day by the Association, and the Wilson Board, in turn, determines the system for allowing selling time to each warehouse. "The crux of the whole

system to the warehousemen, of course," the examiner had said in his initial decision, "is allocation of selling time . . . It is this allocation which is the core of this litigation as it has been the Wilson migraine for years."

Turning to an examination of the inequities in the current system, Commissioner Mason adopted the examiner's characterization of the measurement of performance by poundage rather than baskets sold as "unrealistic and inequitable." Baskets brought in from the farms, the opinion notes, vary from 20 to 300 lbs., yet each basket requires the same amount of space and time to sell. The result is that under the poundage system a warehouse may sell as many baskets as another but have to its credit only one-half as many pounds.

In addition, the opinion declared, a warehouse is allowed to include in its performance only 6.8% of the tobacco resold by speculators (independent buyers on the market who buy and sell for speculative profit). The inequity here, Commissioner Mason stated, is that when this figure of total sales is reached, warehousemen refuse to accept speculators' tobacco for resale, with a resulting unreasonable restraint on their right to do business.

The respondents had appealed the examiner's ruling on these two points as well as his decision that the Commission has jurisdiction over the warehouse activity in Wilson, N. C.

In denying this latter appeal, the opinion noted that "the sale at auction is an integral and indispensable part of interstate commerce in tobacco, not a mere facility or dispensable adjunct to that commerce, affecting, but not in, commerce."

The Commission did modify the examiner's holding that the officers of the various warehouse concerns are responsible individually as well as in their official capacities. There is no evidence, Commissioner Mason said, to support a finding that these officers are individually responsible.

LEGISLATION

Automobile Dealer Franchise Bill Awaits Presidential Action

The President, as yet, has taken no action on the Automobile Dealer Franchise Bill (S. 3879), which authorizes a franchised auto-

mobile dealer to bring suit against an automobile manufacturer for damages sustained by reason of the manufacturer's failure to act in good faith in performing or complying with the terms of the franchise or in terminating, canceling, or not renewing the franchise with the dealer. The bill was presented to the President on July 27th.

Premerger Notification Bill Fails to Clear 84th Congress

The 84th Congress adjourned, with the Senate taking no action on the Premerger Notification Bill (H. R. 9424) after it was reported with amendments by the Senate Judiciary Committee. The bill had been passed by the House. The Senate Judiciary Committee added H. R. 1840, which restricts the good faith meeting of competition defense under the Robinson-Patman Price Discrimination Act. Under this bill, also passed by the House, the defense would not be available where the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly. Among other amendments made by the Senate Judiciary Committee to the Premerger Notification Bill was the addition of a provision enabling corporations planning to merge to institute suits in United States courts for an advance determination of the legality of the merger.

Under the House-passed version of the Premerger Notification Bill, a corporation which plans to acquire the stock or assets of another corporation would be required to notify the Federal Trade Commission and the Attorney General of its intention to acquire such stock or assets 90 days in advance of the consummation of the acquisition, when the combined assets of the corporations involved are in excess of $10 million.

Unless a special session of Congress is called and favorable action is taken, the bill is dead.

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Book Review

Oswald Knauth, BUSINESS PRACTICES, TRADE POSITION, AND COMPETITION, New York: Columbia University Press, 1956 (pp. 177, $3.00).

Dr. Knauth's provocative little volume should prove of interest to those businessmen, lawyers, and economists desirous of a few pleasant hours of rewarding diversion. The author's discussion of the nature and effect of changing business practices is followed by one explaining the role of accountancy, and then by successive chapters on the "trade

position" (a vague term used interchangeably with "trade advantage," "bargaining position," and "protection against the chaotic fluctuation of the untamed market place") of industry, patents, financial institutions, labor unions, and agricultural. After a brief examination of competition and innovation, Dr. Knauth turns his attention to the roles of marketing, investment, and government.

Much of the discussion in this well written work is of considerable value. This reviewer for example, found the chapter entitled "The Tool of Accountancy" extremely illuminating. On the whole, however, one comes away with the feeling that the author's repeated claims of novelty for his ideas detract considerably from his work. Thus, a total rejection (p. 5) of classical theory as developed by Smith, Ricardo, Marshall and Taussig, is preceded by the statement (p. 3) that, "The roles played by different sections of the economy may be at times contradictory even antagonistic yet in the end constructive"—cf., the invisible hand. And the statement that "trade positions," a phrase the meaning of which this reviewer finds indistinguishable from monopoly power, sometimes neutralize each other (p. 42) is presented without even bibliographical reference to Professor Galbraith's concept of countervailing power.

There are, in addition, many statements concerning antitrust policy which reflect some lack of sophistication. Dr. Knauth's statement (p. 5) that legal theory has adopted "almost without change" the norm of perfect competition is certainly debatable. Professor Adelman, for example (finding at least one issue on which he is in agreement with those whom he has so often criticized), recently noted, "It is far-fetched to suppose that the legislative intent [of the Sherman Act] was to protect 'competition' or 'workable competition.' "

Again, the author's implication (pp. 18-19) that because the Sears-Goodyear tire discount arrangement was desired by both parties it should be given special consideration ignores the fact that almost all anti-competitive agreements are satisfactory to the participants. Surely an opponent of the Government's position in this case can find more valid grounds on which to base his criticism.

Finally, one cannot help objecting to what may be described as a tendency toward easy generalization, often based on an incorrect appraisal of certain facts. For example, in discussing the advantages of integration (p. 56) the author cites the oil industry, pointing out that the integrated company has an advantage in the oil industry

because control of crude oil "makes possible smoother operation of its refineries." For this reason, according to Dr. Knauth, refiners strive for control of at least 50 per cent of their throughput. As a huge volume of literature in recent years has made clear, the desire for control of crude oil is sought as much because of the relationship which exists between the price of crude oil and of refined products as it is for technical reason of smoother refinery operation. And if the author were not so prone to dismiss the importance of prorationing (earlier in this volume he describes the oil industry as being controlled "by a loose system of state commissions" which exercise control over the oil industry similar to that exercised by the Amalgamated Clothing Workers in the clothing industry), he might give more weight to the possibility that this crude-products price relationship and, therefore, the integration flowing from it, are hardly inevitable results of the technical characteristics of the petroleum industry.

What has been said above should not obscure a basic contribution of this book—its attempt to discover a new approach to the issues and problems of industrial control. The fact that this attempt has, in this reviewer's opinion, not been entirely successful, in no way detracts from its value in stimulating thought by scholars and practitioners in this field.

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Bar Association Activities

The Committee on the Clayton Act of the New York State Bar Association, Antitrust Section, has stated its opposition to the enactment of the Rogers Bill, H. R. 1840, and the companion Kefauver Bill, S. 11, which would amend the Robinson-Patman Act by eliminating the present right of a seller in good faith to meet the equally low price of a competitor, in all instances where the effect of the exercise of that right "may be substantially to lessen competition or tend to create a monopoly in any line of commerce."

The Committee unanimously opposes this amendment, alleging that (1) the effect of the amendment is far-reaching and almost impossible to determine, thereby creating further uncertainty in an already-confused area of the law and (2) its probable effect would be: (a) to prevent individual freight absorption, (b) to promote exclusive dealing and (c) to sap the vigor of competition.

ILLINOIS STATE BAR ASSOCIATION MEETING

The Section on Antitrust Law of the Illinois State Bar Association announces the program for its meeting to be held at the mid-year meeting of the Association:

Thursday, November 29, 1956
Hotel Sherman,

2:00 P. M. *The Impact of the Cellophane Case.* A discussion of the effect of the decision of the Supreme Court of the United States in *United States* v. *E. I. duPont de Nemours,* 351 U. S. 377 (June 11, 1956) on the interpretation of Section 2 of the Sherman Act and Section 7 of the Clayton Act. The speakers and their topics are:

JOHN T. CHADWELL SNYDER, CHADWELL & FAGERBURG Chicago, Illinois	"Legal tests for violation of Section 2 of the Sherman Act and Section 7 of the Clayton Act in the light of the Cellophane opinion."
PROFESSOR GEORGE W. STOCKING Vanderbilt University	"The economic tests of relevant markets and products and an evaluation of the Cellophane opinion from the economist's point of view."
GERHARD A. GESELL COVINGTON & BURLING Washington, D. C.	"Legal problems involved in proving relevant markets in proceedings under Section 2 of the Sherman Act and Section 7 of the Clayton Act viewed in the light of the Cellophane opinion and experience gained in the trial of the action."

(Meeting to be adjourned at 4:30 P.M.)

5:30 P. M. Reception in honor of Hon. Victor R. Hansen, recently appointed Assistant Attorney General in Charge of Antitrust Division.

6:30 P.M. Dinner in honor of Judge Hansen, who will speak following the dinner.

All interested persons are invited to attend the meeting, as well as the reception and dinner.

FAIR TRADE

Kentucky

McGuire Fair Trade Act declared unconstitutional by Federal District Court for Western Kentucky. Without attempting to dis-

tinguish Fifth Circuit's recent decision to the contrary in Schwegmann v. Eli Lilly, the court ruled that the McGuire Act and the non-signer provisions of Kentucky's Fair Trade Act violate Federal due process and unlawfully delegate legislative powers to private persons. The court also stated that the Supreme Court's decision in the landmark case of Old Dearborn v. Seagram validated fair trade only as between signers of resale price maintenance contracts. In addition, the court suggested that since fair trade is not authorized for the benefit of the general public but rather "to protect the property—namely, the good-will—of the producers," no justification exists for denying a non-signing retailer the opportunity to sell his property at a price of his own choice.

Massachusetts

In Boston a U. S. District Court ruled that four Boston retail stores cannot issue trading stamps in connection with sales of Colgate-Palmolive products. The court's decision was predicated on Colgate's position that trading stamps reduce prices and therefore firms giving stamps with sales of Colgate products are violating the store's fair trade law.

Pennsylvania

General Electric won a fair trade round against a price-cutting department store in Allentown, Pa. Federal Judge Francis L. Van Dusen issued a preliminary injunction restraining Hess Bros. from selling G. E.'s appliances below fair trade prices. The issue revolved around the allegation that the manufacturer had not taken "reasonable and diligent" steps to prevent competitors of Hess Bros. from selling G. E.'s products below fair trade prices. A further hearing is scheduled for September to give the department store an opportunity to have the injunction voided.

In Philadelphia the U. S. Court of Appeals for the Third Circuit upheld a preliminary injunction barring a Department store from selling Omega watches at less than the fair trade prices established by the U. S. distributor of the Swiss made watches. This case is not expected to be reviewed by the court before October.

Colorado

The Colorado Supreme Court has held that the non-signer clause in the state Fair Trade Act is unconstitutional. The Court's unani-

mous decision said in part, "We are not here concerned with the Federal Antitrust Act or amendments thereto, but with the fundamental and basic right of our citizens under the Constitution to deal with their property lawfully acquired as they see fit when such transactions do not violate any statutes passed pursuant to a valid exercise of the police power for the protection of the public. . . . A retailer, not guilty of any fraud or deception, who takes a smaller profit than another retailer is willing to accept for the same property, is not engaged in unfair competition."

Justice Department Requests Reopening of "Detroit" Case

The Justice Department has filed a writ of certiorari with the Supreme Court requesting a reopening of the Standard of Indiana case ("Detroit Case"). The Department's move reflects its desire to overturn a lower court ruling of last May that a supplier may legally offer gasoline at different prices within the same class of customers if he does so in good faith to meet competition.

FTC Eases Reporting Burden

A plan to distribute more equitably the burden of submitting financial reports to the Federal Trade Commission was announced by Acting Chairman Robert T. Secrest.

The plan affects those manufacturing corporations with assets of less than $1 million which are required to submit data for the quarterly Financial Report for Manufacturing Corporations issued jointly by the FTC and the Securities and Exchange Commission.

Heretofore, Commissioner Secrest said, the sampling process did not provide for rotating the sample of smaller corporations, with the result that the entire burden of reporting fell on the same ones year after year. Under the new sampling process, the sample of these corporations will be changed every two years.

The same rotation system cannot be employed for the lesser number of reporting corporations with greater assets without distorting the accuracy of the sample, he said.

FTC Sets Antimonopoly Record in Fiscal 1956

A sharp increase in the issuance of antimonopoly complaints and orders during the year ending June 30, was reported to the Federal Trade Commission.

A case work summary by Alex Akerman, Jr., executive director of the FTC, to Chairman John W. Gwynne revealed that 42 antimonopoly complaints were issued during fiscal 1956 as compared to 36 last year and 28 for the average fiscal year from 1944 through 1953. The summary also listed 40 FTC orders in antimonopoly cases, compared to 30 in fiscal 1955 and 21.4 for the average year from 1944 through 1953.

Included in the Commission's 42 antimonopoly complaints were five charging violation of the Antimerger Act (Sec. 7 of the Clayton Act). This number, Mr. Akerman pointed out, equals the number brought by the Commission in the previous four and a half years since Sec. 7 of the Clayton Act was amended.

Broken down, the report showed that 27 complaints and 23 orders were issued last year under Sec. 2 of the Clayton Act, as amended by the Robinson-Patman Act. These cases, involving discriminations in price, services, brokerage, facilities, etc., compared with 18 such complaints and 16 such orders in fiscal 1955.

The report also showed that 11 of the 42 antimonopoly complaints and 16 of the 40 antimonopoly orders were issued by the Commission under the broader powers of the Federal Trade Commission Act. This Act gives the Commission authority to prevent "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

The other complaints and orders contributing to the record totals were brought under the provisions of the Clayton Act outlawing exclusive dealing and interlocking corporate directorates.

Canada to Study Mergers Carefully

Reports from Canada indicate that mergers will be more carefully studied than ever by agencies charged with enforcing the Combine Investigations Act. One government official has stated that "study of mergers may become increasingly important" in Canada. It should be noted that mergers, trusts or monopolies, in order to be an offense in Canada, must operate or be likely to operate to the detriment or against the interest of the public.

Investigation by House Agriculture Committee

The House Agriculture Committee announced that it will investigate in Texas reports that some oil companies raised gasoline prices

to farmers after Congress ordered a tax rebate on gasoline used on farms. Representative Toage (Democrat, Texas), Vice Chairman of the committee, said that four major oil companies have raised their tank wagon prices for gasoline for farm use since Congress enacted a law providing for a refund of the federal excise tax on gasoline used to run tractors and to carry on farm operations off the highway.

G. M. Auto and Truck Market Increased

Incomplete figures for the current year indicate that General Motors' share of the auto and truck market increased somewhat during 1956. For the calendar year up to September 1 General Motors' car and truck division manufactured 55.1 per cent of industry's indicated total output. Last year during the first eight months their proportion was 52.1 per cent. Data indicate that much of the improvement in General Motors' share of the market was at the expense of Chrysler Corporation, although Ford and independent producers as a group also lost some portion of their total market shares.

Justice Department Report on Oil Regulation

The Justice Department, in its first report to Congress on the effect of oil regulatory activities on competition, stated that the limited funds given for the job simply were not enough to enable it to prepare "adequate and useful" reports. The Department had asked Congress for $763,000, but had received only $25,000. The Department indicated that only on the basis of a broad inquiry into the activities of the Interstate Oil Compact Commission and other oil regulatory bodies could it reach informed judgment as to the competitive effect of the pattern of regulatory action on the oil and gas industry.

FTC Holds Hearings on Oil Industry

Federal Trade Commission hearings on "overriding commissions" given to three major oil companies have been scheduled for early October. The first hearing in the case will examine the agreement between the Texas Company and B. F. Goodrich Company. The F. T. C. contends that commissions oil companies receive from suppliers of tires, batteries, and accessories (TBA items) for recommend-

ing their brands to dealers constitute a restraint of trade. The oil companies involved—Texaco, Atlantic, and Shell—reply that dealers exercise free and independent judgment in purchasing TBA items.

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